No. 15-833

Title:	Scott Kernan, Secretary, California Department of Corrections and Rehabilitation, Petitioner v. Antonio A. Hinojosa
Docketed:	December 29, 2015
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-56012)
Decision Date:	September 25, 2015

---Date---	-------Proceedings and Orders----------
Dec 24 2015	Petition for a writ of certiorari filed. (Response due January 28, 2016)
Jan 20 2016	Order extending time to file response to petition to and including February 29, 2016.
Feb 29 2016	Brief of respondent Antonio A. Hinojosa in opposition filed.
Feb 29 2016	Motion for leave to proceed in forma pauperis filed by respondent Antonio A. Hinojosa.
Mar 15 2016	Reply of petitioner Scott Kernan, Secretary, California Department of Corrections and Rehabilitation filed. (Distributed)
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May 9 2016	DISTRIBUTED for Conference of May 12, 2016.
May 16 2016	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 16 2016	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached Opinion). Justice Sotomayor, dissenting. (Detached Opinion)
Jun 17 2016	JUDGMENT ISSUED

RECORD AND BRIEFS

No. 15-833

DEC 21 2015

In the Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner*,

v.

ANTONIO A. HINOJOSA, *Respondent*.

ON PETITION A FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JENNIFER A. NEILL
Senior Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
PHILLIP J. LINDSAY*
Supervising Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 645-3134
Phillip.Lindsay@doj.ca.gov
**Counsel of Record*

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QUESTIONS PRESENTED

In 2010, California amended state law to prevent prisoners who commit certain misconduct from earning further good-time credits. The state courts have rejected ex post facto challenges to the new law, and the Ninth Circuit has previously held those rulings are not contrary to clearly established federal law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). But here, the court refused to apply AEDPA's presumption that the silent denial of respondent's state habeas claim was a ruling on the merits. The court "looked through" that denial to a venue-based ruling by a state trial court—although the state supreme court was not reviewing the trial court's decision, and there was no venue issue in the higher court. Unconstrained by AEDPA, the Ninth Circuit held, in conflict with the California Supreme Court and two other federal circuits, that changing a law to prevent a state prisoner from earning future good-time credits based on new or continuing in-prison misconduct violates the Ex Post Facto Clause. The questions presented are:

1. Whether AEDPA's presumption that a state decision rejecting a claim is a ruling on the merits can be rebutted by looking through to an earlier state ruling which applied a procedural bar that, under state law, could not be the basis for the later decision.

2. If so, whether a change in state law reducing a prisoner's ability to earn future good-time credits based on new or continuing prison misconduct violates the Ex Post Facto Clause as applied to a prisoner who committed his underlying crime before the change in law.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-24a) is reported at 803 F.3d 412. The opinion of the district court (App. 29a-39a) is unpublished, as are the orders of the state supreme court (App. 40a) and court of appeal (App. 41a) and the opinion of the state superior court (App. 42a-45a).

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2015. App. 1a. The court's opinion directed that the mandate issue forthwith and indicated that no petition for rehearing would be entertained. App. 24a. On November 17, 2015, the court denied the State's motion to recall the mandate and accordingly refused to consider the State's petition for rehearing en banc. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Respondent Hinojosa was released on parole after the court of appeals ordered immediate implementation of its decision. While on parole he is in the constructive custody of Secretary Beard, who is therefore substituted as the named petitioner in this case in accordance with this Court's Rule 35.3.

STATUTORY PROVISION INVOLVED

1. Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

2. Section 2933.6 of the California Penal Code provides in pertinent part as follows, with the italicized language in subsection (a) having been added by Cal. Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 44, effective January 25, 2010:

> (a) Notwithstanding any other law, a person who is placed in a Security Housing Unit or an Administrative Segregation Unit for misconduct described in subdivision (b) *or upon validation as a prison gang member or associate* is ineligible to earn work credits or good behavior credits during the time he or she is in the Security Housing Unit or the Administrative Segregation Unit for that misconduct.

(b) This section applies to the following offenses:

(1) Murder, attempted murder, and solicitation of murder. For purposes of this paragraph, solicitation of murder shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances.

(2) Manslaughter.

(3) Assault or battery causing serious bodily injury.

(4) Assault or battery on a peace officer or other nonprisoner which results in physical injury.

(5) Assault with a deadly weapon or caustic substance.

(6) Rape, attempted rape, sodomy. attempted sodomy, oral copulation, or attempted oral copulation accomplished against the victim's will.

(7) Taking a hostage.

(8) Escape or attempted escape with force or violence.

(9) Escape from any departmental prison or institution other than a camp or reentry facility.

(10) Possession or manufacture of a deadly weapon or explosive device.

(11) Arson involving damage to a structure.

(12) Possession of flammable, explosive material with intent to burn any structure or property

(13) Solicitation of assault with a deadly weapon or assault by means of force likely to produce great bodily injury, arson, or a forcible sex act.

(14) Intentional destruction of state property in excess of four hundred dollars ($400) during a riot or disturbance.

(c) This section does not apply if the administrative finding of the misconduct is overturned or if the person is criminally prosecuted for the misconduct and is found not guilty.

STATEMENT

1. In 2003, Respondent Hinojosa pleaded guilty to armed robbery and street terrorism. App. 3a. He was sentenced to sixteen years in prison. *Id.* When he committed his crimes state inmates were generally eligible to earn custody credits against their sentences for good behavior. The law, however, prohibited an inmate from earning future custody credits if he engaged in misconduct that required him to be segregated from the general population. *See* Cal. Penal Code §2933.6 (West 2002) (reprinted above as later amended). At that time, section 2933.6 applied to inmates segregated based on misconduct such as murder, attempted murder, manslaughter, rape, hostage-taking, or assault. It did not include segregation based on conduct demonstrating or confirming affiliation with a prison gang. *Id.*

In 2009, prison officials "validated" Hinojosa as an associate of the Mexican Mafia prison gang. App. 3a.[2] Once validated, the state considered Hinojosa a

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[2] The Mexican Mafia is a California prison gang, which was formed in 1957 and by 1977 controlled most of the criminal activity inside California's prisons. While the Mexican Mafia exerts control over virtually all Hispanic street gangs in Southern California, it is separate from the street gangs and requires its members to take a blood oath in order to join. *See People v. Valdez*, 55 Cal. 4th 82, 94 (2012); *People v. Sisneros*, (continued...)

threat to the safety and security of the institution, requiring his placement in a Security Housing Unit, or SHU. Cal. Regs. tit. 15, § 3341.5(c)(2)(A)(2) (2002); App. 3a-4a.

In October 2009, a broad criminal justice reform measure was signed into law that increased property crime thresholds, reformed credit-earning schemes, and gave discretion to corrections officials and counties to determine appropriate conditions of parole and probation. Cal. Senate Bill No. 18, 3rd Ex. Sess. 2009-2010. Among the dozens of reforms made in that bill was an amendment to California Penal Code section 2933.6 to provide that segregation based on validated gang affiliation would also prevent an inmate from earning future sentence-reducing credits. Before the 2010 amendment, Hinojosa's expected release date was September 27, 2015. App. 6a. After the amendment, that date was extended one year to September 27, 2016. *Id.*

Hinojosa filed a state habeas petition challenging the application to him of the 2010 change in section 2933.6. App. 42a. The state superior court construed the petition to raise two claims: that applying the amendment to him violated his plea agreement and his due process rights, and that it violated the Ex Post Facto Clauses of the state and federal constitutions. *Id.* at 43a. The court denied the first claim on the merits but dismissed the ex post facto claim for improper venue, holding that Hinojosa should have brought that claim in the county where he was confined, not where he was convicted. *Id.*; *id.* at 44a. Under standard California procedure, Hinojosa pursued the matter not by

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(...continued)
174 Cal. App. 4th 142, 147-149 (2009) (describing requirements by prison for validation in the gang).

appealing from the superior court's judgment but by filing a new habeas petition, raising the same claims, in the California Court of Appeal. *Id.* at 41a; *see generally, e.g.*, *Walker v. Martin*, 562 U.S. 307, 312 (2011) (describing California habeas procedure). That court denied the new petition without comment. App. 41a. Hinojosa then filed another original habeas petition (not a petition for discretionary review of the court of appeal's decision) in the California Supreme Court. *Id.* at 40a. That court, too, denied the petition without comment. *Id.*

2. Hinojosa then filed a federal habeas petition in the district court. App. 30a. Applying AEDPA's strict standards, the district court denied relief. *Id.* at 30a, 33a, 36a. Hinojosa appealed, and the court of appeals granted a certificate of appealability limited to "whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause." App. 27a. After further review, that court reversed. *Id.* at 1a-24a.

The court of appeals began by acknowledging that the same claim had previously come before it in the context of federal habeas review, under AEDPA, of California decisions rejecting ex post facto challenges to application of the 2010 amendment. App. 9a-10a. In *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 295 (2014), the court had "considered this same question on similar facts" and concluded that the state courts' rejection of the claim was not contrary to, or an unreasonable application of, clearly established federal law as established by this Court. *See id.*

In this case, however, the court held that it was not constrained by the deferential AEDPA standard of review. App. 9a-11a. The court acknowledged that under *Harrington v. Richter*, 562 U.S. 86, 98-100

(2011), and *Johnson v. Williams*, 133 S. Ct. 1088 (2013), an unexplained denial of relief by a state court is presumed to be a decision "on the merits" for purposes of 28 U.S.C. 2254(d), and thus entitled to full AEDPA deference. *Id.* at 10a. Here, however, the court faulted the State, which relied on those decisions, for "fail[ing] to comprehend the relationship between *Richter* ... and *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which directs us to consider the last reasoned decision of the state courts, *see id.* at 806." App. 10a (parallel citations omitted). Under *Ylst*, the court observed, "[w]here the last reasoned state-court decision rejects a federal claim solely on procedural grounds, any presumption that a subsequent summary denial decided the claim on the merits is rebutted." *Id.* at 10a-11a. Because the state superior court, which was the only state court to issue an opinion, denied Hinojosa's ex post facto claim on the procedural ground of improper venue, the court of appeals concluded that it was "not bound by AEDPA" in its federal habeas review. *Id.*[3]

Reviewing Hinojosa's claim de novo, the court held that it violated the Ex Post Facto Clause to apply the 2010 amendment to section 2933.6 "to prisoners, like Hinojosa, who committed their underlying criminal conduct before the amendment's enactment." App. 24a. The court relied on its own

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[3] The court also acknowledged that, even if the state judgment was based on a procedural default, normally a federal habeas court would not be able to reach the merits of a claim so long as the procedural rule in question was "firmly established and regularly followed" as a matter of state law. App. 11a. In that regard, however, the court faulted the State for not arguing a state procedural default, and thus deemed the issue waived. *Id.* (The State, of course, had no occasion to argue procedural default if the state supreme court ruled on the merits.)

precedent involving changes to the consequences of parole violations, which in turn had adopted as controlling authority this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644, 644-45 (D. Mass. 1967), *aff'd*, 390 U.S. 713 (1968) (per curiam)—although again the court had previously held, in the AEDPA context, that *Greenfield* did not "clearly establish" a federal rule applicable to the different situation in which a state changes the rules applicable to ongoing prison misconduct. *Id.* at 13a-15a & n.6; *see Nevarez*, 749 F.3d at 1128-1129.

Reviewing the matter de novo, the court concluded that the same rule applies where a change in the ability to earn good-time credits based on prison misconduct alters a prisoner's eligibility for earlier release. App. 17a-18a. In that regard, the court of appeals accepted the conclusion of the California courts that the gang-related misconduct at issue in this case is a continuing offense, and thus that the amendment to section 2933.6 could properly be applied to stop any future earning of credits after its effective date "if the relevant date [for ex post facto analysis] is the date of the in-prison misconduct." *Id.* at n.8. It concluded, however, that application of the amendment to a current prisoner, even based on new or ongoing prison misconduct, should be analyzed as changing the legal consequences of the underlying criminal conduct. *Id.* at 17a-18a. The court thus remanded the matter with instructions to issue the writ and direct the State to release Hinojosa on the date he would have been released if he had continued to earn release credits under the prior version of section 2933.6. *Id.* at 24a.

The court directed that its mandate issue "forthwith," and indicated that "[n]o petition for

rehearing w[ould] be entertained." App. 24a. After releasing Hinojosa onto parole, the State asked the court to recall its mandate so that it could consider a petition for en banc rehearing that the State lodged along with its request—making clear that it would not seek to return Hinojosa to physical custody unless and until the panel's decision was superseded by one favorable to the State. *See id.* at 25a. The court denied that motion, and thus refused to consider the State's en banc petition. *Id.*[4]

REASONS FOR GRANTING CERTIORARI

When a state court has adjudicated a federal claim on the merits, a federal habeas court may set aside the state judgment only if it is contrary to

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[4] After Hinojosa was released on state parole, he was detained by federal immigration authorities. The State is informed that he has since been deported to Mexico. He nonetheless remains on state parole for three years subject to parole conditions the State imposed on him, including a condition that he not reenter the United States illegally. *See, e.g.*, Cal. Penal Code § 3053(a) (West 2015) (State may impose parole conditions); *see also People v. Laupas*, 188 Cal. App. 4th 436 (2010) (upholding condition that probationer not reenter the United State illegally). Hinojosa could be subject to parole revocation should he violate his parole conditions, Cal. Penal Code § 3000.08, and to reincarceration in California to serve the remainder of his prison term if the court of appeals' judgment is reversed. The case is therefore not moot. *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (government petition to reinstate vacated conviction not mooted by defendant's deportation); *see also, e.g., United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992) (government appeal seeking longer sentence not moot where defendant served sentence imposed by district court and was deported); *United States v. Suleiman*, 208 F.3d 32, 36-38 (2d Cir. 2000) (same); *United States v. Alvarez-Pineda*, 258 F.3d 1230, 1235 (10th Cir. 2001) (same).

federal law clearly established by this Court. Where, as here (App. 40), the state court rejects a claim without comment but in an actual ruling (not merely a denial of discretionary review), this Court has recognized a strong presumption that the state court acted on the merits. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 98-100 (2011). While in some circumstances a federal habeas court may instead "look through" the silent denial of a claim by a higher state court and presume that it rested on the same ground as the last reasoned decision of a lower court rejecting the claim, that type of analysis should not be allowed to supersede the presumption of action on the merits if the purported "look through" makes no legal or logical sense in the context of a particular case.

Here, the California Supreme Court rejected, without comment, a federal claim raised in a state habeas petition filed in the supreme court itself—not in an appeal from the judgment of a lower court. App. 41a. The Ninth Circuit refused to treat that silent denial as a merits ruling, entitled to deferential review under AEDPA, on the theory that, under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), it should instead presume that the state high court's ruling rested on the same procedural ground that a state superior court had given for dismissing an earlier petition brought in *that* court—improper venue. App. 10a. In the circumstances of this case, however, reliance on *Ylst* makes no sense at all. The procedural bar invoked by the superior court (improper venue) could not, as a matter of state law or common sense, have applied to Hinojosa's original petition in the state supreme court, which by definition has statewide jurisdiction. And more generally, the state high court, adverting specifically to this Court's decision in *Richter* concerning the

presumption of merits adjudication, has expressly confirmed that when it denies a state prisoner's federal claim without explanation, it has considered and rejected that claim on the merits. Under these circumstances, the court of appeals' invocation of *Ylst* to displace *Richter*, and its consequent refusal to accord AEDPA deference to the California courts' established position on the federal question at issue, were plainly wrong.

That threshold failure to comply with AEDPA led the court to use this federal habeas case to address Hinojosa's ex post facto claim de novo, and in the process create a conflict not only with the California courts (including a longstanding, reasoned decision of the state supreme court) but also with decisions of the Second and Fourth Circuits. All those courts have previously held that changes to statutes or rules that reduce a prisoner's ability to earn future good-time credits as a consequence of in-prison misconduct do not violate the Ex Post Facto Clause. The contrary decision of the Ninth Circuit in this case puts state prison officials in the untenable position of being forced to choose whether to continue enforcing a state statute that has been expressly upheld by the state courts or, instead, stop enforcing state law because of a contrary view on the part of the regional federal court of appeals. Accepting the federal decision would also interfere substantially with the State's ability to administer its prisons and to deter serious and ongoing in-prison misconduct.

This Court should grant certiorari in the first instance to correct the court of appeals' improper failure to continue deferring to the state courts' consistent rejection of the federal claim raised in this case. Reversing the decision below on that basis would eliminate the legal conflict the court of appeals has created and restore the legal clarity needed by

state prison officials. Alternatively, if the Court concludes that the court of appeals properly addressed the ex post Facto question here de novo, then it should provide the necessary clarity itself by resolving the conflict created by the Ninth Circuit's decision in this case.

1. State courts are not required to explain their reasoning when they reject a federal claim. *Richter*, 562 U.S. at 98-100. When a state court denies a federal claim without explanation, federal courts must generally presume that the state court adjudicated the claim on the merits. *Id.* As a merits adjudication, the state decision may be set aside on federal habeas review only if it is contrary to or an unreasonable application of federal law as clearly established by this Court's decisions. *Id.*; 28 U.S.C. § 2254(d). And as the decision below expressly acknowledges, under that strict standard federal habeas courts would defer—as the Ninth Circuit previously has—to the determination of the California courts that application of amended section 2933.6 to a state prisoner like Hinojosa does not violate the Ex Post Facto Clause. App. 9a; *Nevarez v. Barnes*, 749 F.3d 1124, 1128 (9th Cir. 2014).

Application of the *Richter* presumption of on-the-merits adjudication makes particular sense in cases, such as this one, where the California Supreme Court has rejected a federal claim in an actual ruling (that is, not simply by denying discretionary review) but without explanation. The state court has expressly confirmed, after and in light of *Richter*, that "[u]nless otherwise stated in the order, such summary denials indicate this court has considered and rejected the merits of each claim raised." *In re Reno*, 55 Cal. 4th 428, 447 (2012). In making that statement, the court specifically cited *Richter*'s statement that "it may be presumed that

the state court adjudicated the claim on the merits in the absence of any indication of state-law procedural principles to the contrary." It also cited the contemporaneous decision in *Walker v. Martin*, 562 U.S. 307 (2011), another case arising out of California in which this Court observed that, under California's state habeas procedures, an "order denying a [habeas] petition without explanation or citation ordinarily ranks as a disposition on the merits." *Id.* (citing *Richter*, 562 U.S. at 99, and *Martin*, 562 U.S. at 310). Accordingly, when the California Supreme Court denied Hinojosa's state habeas petition without opinion, its decision reflected consideration and rejection of his federal claim on the merits—and the state high court had every reason to expect that it would be so understood by any later federal habeas court, and accorded appropriate deference under AEDPA.

"[T]he *Richter* presumption is a strong one that may be rebutted only in unusual circumstances " *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). It "may be overcome when there is reason to think some other explanation for the state court's decision is more likely," *Richter*, 562 U.S. at 99-100; and one possible such reason is the ability of the federal court, under appropriate circumstances, to "look through" the silent decision of one state court to the prior, reasoned decision of a lower court and to presume that the higher court's otherwise unexplained decision rests on the same, previously articulated grounds. *See id.* (citing *Ylst v. Nunnemaker*, 501 U.S. at 803). Even before AEDPA and *Richter*, however, this Court had cautioned that a federal habeas court contemplating such a "look through" must have due regard for the "details of state law," which might establish that there would be no sound basis for applying the look-through

presumption in a particular case. *Ylst*, 501 U.S. at 803.

Here, the court of appeals held that the *Richter* merits presumption was rebutted by the *Ylst* look-through presumption. App. 10a. It "looked through" the state supreme court's silent denial of a habeas petition presented to that court and inferred that it rested on the same ground as the superior court's procedural denial of the petition previously presented to *that* court. *Id.* In this case, however, it requires no complex inquiry into state law to understand that "the [*Ylst*] presumption, as applied, is wrong." *Ylst*, 501 U.S. at 803. First, the state supreme court has expressly said, in this specific context, that its silent denials are to be understood as rulings on the merits. *In re Reno*, 55 Cal. 4th at 447. (Where the court instead relies on a procedural ground for rejection, it typically includes a citation to indicate as much. *See, e.g., In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (discussing certain procedural bars imposed by the court's orders and explaining that when an order does not expressly impose a procedural bar raised by a respondent, the court has rejected that particular bar).) And second, as a matter of straightforward California procedural and substantive law, the faulty-venue ground invoked by the superior court *could not* have provided the basis for the later supreme court decision.

Procedurally, a California inmate has no right to appeal a denial of a habeas corpus petition by a superior court. Cal. Penal Code §§ 1506, 1506; *In re Clark*, 5 Cal. 4th 750, 767 n.7 (1993). To seek further consideration, he files a new petition in the California Court of Appeal. *Clark*, 5 Cal. 4th at 767 n.7. If that petition is denied, the inmate may file either (i) a petition for discretionary review of the denial or (ii) another new petition, this time directly

in the California Supreme Court. *See also Martin*, 562 U.S. at 312-313; *Carey v. Saffold*, 536 U.S. 214, 221 (2002) (discussing California's "original writ system"). Hinojosa followed the second course, filing a new petition in the supreme court. App. 40a. When adjudicating claims brought in a new habeas corpus petition, the California Supreme Court exercises original jurisdiction—not appellate jurisdiction. *Clark*, 5 Cal. 4th at 767 n.7. And that original jurisdiction extends, by definition, to the entire State. Thus, the faulty-venue ground for dismissal invoked by the superior court could not possibly have provided the basis for the California Supreme Court's summary order denying Hinojosa's habeas petition to that court.

It was, accordingly, the court of appeals—not the State—that "fail[ed] to comprehend the relationship between *Richter* ... and *Ylst*" in this case. *See* App. 10a. There was no basis in this case for the court to rely on a look-through under *Ylst* for holding that the *Richter* presumption of state-court merits adjudication had been rebutted and that the federal court was "not bound by AEDPA." *Id.* at 11a. On the contrary, the court was required to apply *Richter* (and take the California Supreme Court at its word in *Reno*), recognize the state court's rejection of Hinojosa's ex post facto claim as a decision on the merits, and defer to that decision, for federal habeas purposes, unless Hinojosa could meet AEDPA's strict standard for setting it aside—which, as the court acknowledged (*id.* at 9a), he could not. Because it improperly failed to apply AEDPA, the court embarked on a de novo consideration of the ex post facto claim that led it, as described below, to create a decisional conflict, put state prison administrators in an untenable position, and adopt a constitutional position that would unduly hamper the

administration of state prison systems throughout the Ninth Circuit. This Court should grant certiorari on the first question presented in order to clarify the relationship between *Richter* and *Ylst* and to enforce AEDPA's bar on the relitigation, in federal habeas proceedings, of claims that have already been permissibly rejected by the state courts on the merits.

2. On the merits, the Constitution provides that "[n]o State shall ... pass any ... ex post facto Law ...." U.S. Const. art. I, § 10, cl. 1. "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). "To fall within the ex post facto prohibition, a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (citations omitted); *see also, e.g.*, *Weaver*, 450 U.S. at 29.

As to retrospective application, the "critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. As the court of appeals recognized, however, the question in this case is whether the relevant "acts" for purposes of this analysis are the crimes that led to Hinojosa's incarceration or the gang-related misconduct he committed in prison that led to his commitment to segregated housing and, after the 2010 amendment to section 2933.6, to the loss of his ability to earn good-time credits so long as that misconduct continued. App. 12a-13a. Relying on its own prior cases, *Weaver*, and this Court's summary affirmance

of the three-judge decision in *Greenfield v. Scafati*, 277 F Supp. 644, 644-45 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968), the court of appeals held that it was Hinojosa's 2002 criminal conduct that provided the basis for the ex post facto analysis, even though it was ongoing in-prison misconduct that triggered application of the 2010 amendment. App. 13a-15a. The court reasoned that altering "a prisoner's ability to earn [good-time] credits affects the length of his prison term and therefore affects the measure of punishment attached to the original crime." *Id.* at 13a.

The court of appeals' holding misapplies *Weaver* and *Lynce v. Mathis*, 519 U.S. 433 (1997). *Weaver* was this Court's first non-summary decision addressing a change to a state's statutory scheme affecting prisoner good-conduct credits. There, Florida provided its prisoners with good-time credits of five, ten, or fifteen days per month, depending on the number of years the prisoner had served on his sentence. *Weaver*, 450 U.S. at 26. The State then amended its good-conduct statute, reducing the credits to three, six, and nine days per month. *Id.* Under these circumstances, this Court explained that the question whether the change was retrospective "c[ould]be recast as asking whether [the amended statute] applie[d] to prisoners convicted for acts committed before the provision's effective date." *Id.* at 31. The Court concluded that the amendment was retrospective because it replaced the general credit-earning scheme that was in effect at the time Weaver committed his crimes. *Id.* The amendment also disadvantaged Weaver, because it reduced his "opportunity to shorten his time in prison *simply through good conduct*." *Id.* at 33-34 (emphasis added). The Court reasoned that "a prisoner's eligibility for reduced imprisonment is a significant

factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 33.

In *Lynce* the Court considered a Florida statute repealing certain early-release credits that had previously been awarded to prisoners because of prison overcrowding. *See* 519 U.S. at 435. After taking account of Lynce's credits, prison officials released him from prison in 1992. *Id.* Shortly after his release, the State determined that a new 1992 statute had retroactively repealed certain credits. *Id.* at 436. Lynce was rearrested and returned to physical custody. *Id.*

This Court held that the credit cancellation and reincarceration were clearly retrospective. *Id.* at 441. The State argued that repeal of the credits did not violate the Ex Post Facto Clause because the credits were awarded to alleviate overcrowding, not for good conduct as in *Weaver*. *Id.* at 442. This Court held, however, that the Legislature's subjective purpose was irrelevant. *Id.* Citing *Weaver*, the Court reiterated that altering a credit scheme can constitute an increase in punishment because eligibility for reduced imprisonment in the ordinary course of serving a sentence is a "significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.* at 445-446 (citation omitted).

In *Weaver* and *Lynce*, Florida sought to reduce or eliminate credits that were made available to all state prisoners as part of the State's general scheme of sentencing and incarceration. The changes were retrospective because they, too, applied automatically to affected prisoners, without regard to any post-conviction misconduct. *Weaver*, 450 U.S. at 31; *Lynce*, 519 U.S. at 441. And they disadvantaged the affected prisoners by, in effect, extending the amount

of time they would be in prison if they simply served their time in the ordinary course, without any new misconduct.

California's statute is different. Unlike the prisoners in *Weaver* and *Lynce*, Hinojosa was affected by the 2010 amendment to section 2933.6 only because he continued to commit in-prison misconduct after its effective date. *See* App. 16a n.8. Absent that misconduct, Hinojosa would have continued to have the opportunity to earn the same amount of credits after the 2010 amendment as he did before. The amendment is triggered only by new or continued misconduct occurring *after* its effective date.

3. The court of appeals held that for purposes of the Ex Post Facto Clause a prospective change in a current prisoner's ability to earn good-time credits based on in-prison misconduct was the same as a change in the credit rules applicable to a prisoner who is returned to custody after violating a condition of probation, parole, or other supervised release. App. 13a-15a. That holding conflicts with longstanding and previously uniform decisions of the California courts and the Second and Fourth Circuits.

a. Thirty years ago, the California Supreme Court rejected an Ex Post Facto Clause challenge to statutory changes affecting the regulation of inmate behavior in state prisons and, in particular, how certain misconduct would affect a prisoner's ability to earn or retain good-time credits. *In re Ramirez*, 39 Cal. 3d 931 (1985), *cert. denied*, 476 U.S. 1152 (1986). The state Legislature amended the Penal Code to expand the acts of misconduct subject to credit forfeiture and to increase the number of days a prisoner might forfeit. *Id.* The state supreme court held that applying the new rules uniformly to all

current inmates, including a prisoner who had committed his crimes before the amendment, did not violate the federal or state Ex Post Facto Clauses. *Id.* at 936. Applying this Court's decision in *Weaver v. Graham*, the state court held that the amendments changed only the definition and consequences of in-prison misconduct and thus operated only prospectively, rather than increasing the punishment for a prisoner's original crime. *Id.* at 936-937 The court reasoned that "[i]f any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison." *Id.* at 936.

Ramirez specifically distinguished the statute this Court considered in *Weaver*· "There is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence—the issue in *Weaver*—and an increase in sanctions for *future misbehavior* in prison—which is at issue here." 39 Cal. 3d at 937. The court also reasoned that, even considered in relation to a prisoner's initial offense, amendments to the rules for in-prison behavior neither increased the petitioner's maximum sentence nor reduced the credit he could earn against that sentence by complying with prison rules. *Id.* The court recognized *Weaver*'s teaching that a general statutory structure for earning good-time credits could be a significant factor in plea bargains and sentencing, but in the context of changes to the particular rules governing prison behavior it rejected "the notion that the sanctions for possible future prison misconduct constitute a 'significant factor' for either the trial judge or defendant." *Id.*

Finally, *Ramirez* specifically considered this Court's summary affirmance in *Greenfield*, which had addressed a Massachusetts law that changed

how a prisoner who *complied* with prison rules could earn good-time credits after being *returned* to prison for violating the terms of an earlier parole. 39 Cal. 3d at 937-938. The California Supreme Court concluded that *Greenfield* did not control the case before it, dealing with adjustments to the rules for in-prison misconduct, for two reasons: that decision had focused "on conduct outside the prison walls," rather than on "the effect on prison administration of a holding that the statute was invalid," and "invalidating the [*Greenfield*] statute as to certain prisoners did not have the effect of immunizing their future conduct from sanctions for prison rule violations." *Id.* at 938. In contrast, the court explained, it would be "something entirely different to have a prison population subject to different disciplinary rules and penalties for violations in prison," depending on when they had committed their underlying crimes. *Id.* at 937. "From the standpoint of prison order," it would be "simply infeasible to run a prison in which some inmates [were] wholly or partially immune from punishment for conduct for which others receive[d] serious penalties," such as loss of sentence credits. *Id.*[5]

Although *Ramirez* was decided in 1985 and addressed a different statute, its application to the present case, and thus the conflict between it and the

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[5] Because *Ramirez* specifically considered and distinguished *Greenfield* and the context of changes in consequences for violations of post-release restrictions, there is no reason to think that the California Supreme Court would change its position if it reconsidered the issue here in light of either the court of appeals' reasoning in the present case or any post-*Ramirez* authority addressing the post-release context, such as this Court's discussion of *Greenfield* and federal supervised release in *Johnson v. United States*, 529 U.S. 694, 700-701 (2000).

Ninth Circuit's decision in the present case, is clear. Moreover, two recent precedential California appellate court decisions address the specific statutory amendment at issue here and confirm the position of the state courts that uniform application of the amendment to all current prisoners does not violate the federal Ex Post Facto Clause. *In re Efstathiou*, 200 Cal. App. 4th 725, 729-730 (2011); *In re Sampson*, 197 Cal. App. 4th 1234, 1241-1242 (2011).[6] And in the state habeas proceedings that preceded the federal proceedings in *Nevarez*, the state superior court relied on *Sampson*, and the California Supreme Court summarily denied an original habeas petition presented to that court—a decision that, again, reflects consideration and rejection of the claim on the merits. *See Nevarez*, 749 F.3d at 1127-28 (reciting history and sustaining state rejection of claim on AEDPA review); *In re Reno*, 55 Cal. 4th at 447 [7] There is, accordingly, no question that the position of the state courts, including the California Supreme Court, is that section 2933.6 may be validly applied to any current prisoner who

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[6] Trial courts throughout the State are bound to follow these appellate decisions. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal. 2d 450, 455 (1962).

[7] The California Supreme Court's docket records confirm that *Nevarez* involved summary denial of an original petition, not a denial of discretionary review of a decision by the state court of appeal. *See* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1994545&doc_no=S197257. In *Efstathiou* and *Sampson*, the state supreme court denied discretionary review. http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1999997&doc_no=S198672; http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1988023&doc_no=S195508.

engages in the ongoing in-prison misconduct at issue here, regardless of the date of his original offense.

b. The Ninth Circuit's decision in this case also conflicts with decisions of the Second and Fourth Circuits addressing similar ex post facto claims.

In *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000), the Second Circuit addressed a change to the ability to earn good-conduct credits much like the 2010 California amendment at issue here. Three months after Abed was sentenced, the Connecticut Department of Corrections issued a directive eliminating good-time credits for inmates who were classified as "prison gang members and who, as a result, posed 'a threat to the safety of staff, the facility, inmates or the community or the order of the department.'" *Id.* at 65 (citation omitted). Abed was classified as a gang member, and was deprived of the ability to earn good-time credits for some forty months while that classification remained in effect. *Id.* He argued that application of the new directive to him violated the Ex Post Facto Clause. *Id.* The Second Circuit rejected that claim, on de novo review.[8] The court noted that, unlike the statutes at issue in *Weaver* and *Lynce*, Connecticut law made the award of good-time credit "a discretionary matter." *Id.* at 66. In addition, however, the court held that the new directive "was not applied retroactively" to Abed, because "[b]y its terms, [it] concerned ongoing and future—not past—conduct." *Id.* That way of analyzing the gang-conduct rule at issue in *Abed* for ex post facto purposes cannot be reconciled with the Ninth Circuit's decision in this case.

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[8] Although Abed's federal habeas claim was decided after AEDPA went into effect, the Second Circuit's decision does not mention the new Act and addresses the issues before the court de novo.

Similarly, the Fourth Circuit held that a new statute that could result in the forfeiture of good-conduct credits for refusal to provide a DNA sample could be applied to all Virginia prisoners, including those who committed their underlying crimes before the DNA requirement was enacted. *Jones v. Murray*, 962 F.2d 302, 308-310 (4th Cir. 1992). The court explained that reasonable prison regulations fall within a prisoner's anticipated sentence, and "since a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate." *Id.* at 309-310. Accordingly, the Ex Post Facto Clause did not forbid imposing administrative punishments, including "the denial of good-time credits," on any current prisoner who refused to comply. *Id.* at 310.

While *Jones* was pending in the courts, Virginia prison officials adopted administrative regulations providing for a potential loss of good-time credits as a sanction for refusing to provide a DNA sample, and later amended the regulations to increase the amount of good-time credit that could be lost. *Ewell v. Murray*, 11 F.3d 482, 484-485 (4th Cir. 1993). The Fourth Circuit confirmed its decision in *Jones* that the new regulations could be applied to all prisoners, and further rejected any Ex Post Facto Clause objection to the regulatory amendment increasing the potential forfeiture of credits. *Id.* at 486-487. The court began by noting that inmates who complied with all prison regulations would not spend more time in prison after adoption of the new provisions than they would have before. *Id.* at 486. It thus framed the question before it as "whether prison officials may, consistent with the Ex Post Facto Clause, reasonably increase the penalties for prospective violations by inmates of reasonable

prison regulations when the penalties may involve the loss of good conduct time credits." *Id.* The court concluded that such an increase is permissible because it "does not add punishment for the original crime for which the inmate was incarcerated." *Id.* "While an inmate has the right, as of the time of his sentence, to expect the good conduct credits then defined for good behavior, he has no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." *Id.* That holding likewise cannot be reconciled with the Ninth Circuit's holding in this case that the Constitution forbids California from applying to all current inmates a change in prison rules that decreases a prisoner's opportunity to earn good-time credits during a period of ongoing misconduct.

4. The decision below subjects California prison officials to conflicting legal directives from the state and federal courts. Implementing it would also interfere substantially with the ability of California—and other States in the Ninth Circuit—to administer state prisons, deter serious in-prison misconduct, and respond to evolving penological challenges. If the Court does not reverse the judgment below based on the court of appeals' improper failure to follow AEDPA, then it should address the second question presented in order to provide state officials with uniform guidance on these important issues.

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). "Beyond question, the authority of States over the administration of their

criminal justice systems lies at the core of their sovereign status." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). Federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). *See also Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (appropriate deference must be given to "the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"); *McGinnis v. Royster*, 410 U.S. 263 (1972) (rejecting equal protection challenge based on different application of good-time credits in context of presentence jail custody and prison incarceration).

In discharging their complex and difficult responsibilities, California prison officials must seek to comply both with state statutes and with relevant decisions of the state and federal courts. In the specific context at issue here, before the decision in this case, officials had been directed by the state Legislature to implement the 2010 amendment to section 2933.6; told by the state courts that applying that amendment uniformly to all inmates was consistent with the federal and state Constitutions; and indeed assured by the Ninth Circuit that those state decisions were not contrary to any clearly established federal law. *See, e.g., In re Efstathiou, supra*; *Nevarez, supra*. More generally, for thirty years they had been able to rely on the California Supreme Court's assurance, in *In re Ramirez*, that the Ex Post Facto Clause did not prohibit uniform application to current inmates of reasonable changes

to prison conduct regulations, even if those changes could affect the credit-earning ability of an inmate who engaged in future misconduct. *See Ramirez*, 39 Cal. 3d at 937.

The decision below conflicts with that previously clear and uniform guidance, and puts prison officials in an untenable situation. The statutory command in section 2933.6 remains in place, as do the state decisions specifically rejecting federal ex post facto challenges to its uniform implementation. The state courts have full authority to interpret and apply federal law, and their precedential holdings on federal questions are no less binding on state officials than those of the lower federal courts, including the Ninth Circuit. *Cf. People v. Bradley*, 1 Cal. 3d 80, 86 (1969) ("On a federal question, the decisions of the United States Supreme Court are binding on state courts. However, the decisions of the lower federal courts, while persuasive, are not binding on us.") On the other hand, no state official will normally wish to be in the position of seeming to ignore or act counter to directly applicable Ninth Circuit authority—particularly when that court's decisions could control the result in future federal civil litigation, subject only to the possibility of later intervention by this Court. California officials thus have a clear and practical need either to have the Ninth Circuit's judgment in this case reversed, and the decision vacated, under AEDPA, thus returning the situation to what it was before the decision, or for this Court to address the merits and provide definitive guidance.

Moreover, the answer to the ex post facto question here, which has been thrown into doubt by the decision below, is one of general importance. Most States use some form of good-conduct credits in administering their sentencing and prison systems,

and empirical studies point to the benefits of such systems in areas such as prison discipline, recidivism, and corrections budgets. Michael O'Hear, *Good Conduct Time for Prisoners: Why (and How) Wisconsin Should Provide Credits Toward Early Release*, 98 Marq. L. Rev. 487, 530, 542 (2014). The court of appeals' decision here, if implemented, would substantially interfere with the ability of many States to use their credit schemes to deter serious in-prison misconduct, and to adapt their prison regulations and credit systems over time in response to changing circumstances.

While this case involves the gang-validation provision of Penal Code section 2933.6, the logic of the decision below reaches much further. Section 2933.6 limits an inmate's credit-earning status based on many serious in-prison infractions that lead to a need for segregated housing, including murder, assault, battery, rape, and hostage-taking. Cal. Penal Code § 2933.6. Under the Ninth Circuit's reasoning, the Constitution bars the Legislature and prison officials from imposing these credit limitations on any inmate who committed his underlying crime before section 2933.6 was enacted in 1992.

In addition, the decision below does not appear limited to changes to section 2933.6 or similar statutes or regulations affecting the ability to earn credits in the future based on in-prison behavior. Its logic also appears to extend to changes to *any* rule governing in-prison misconduct for which credits already earned may be forfeited. App. 20a (addressing both changes in credit-earning status and revocation of existing credits). The net result would seem to be that any change to a prison disciplinary system affecting the earning or forfeiture of good-time credits could be applied only to future generations of prisoners who commit new crimes at

some point after the prison-conduct rule is changed. That is not a workable rule. As the California Supreme Court recognized long ago, "[f]rom the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties." *Ramirez*, 39 Cal. 3d at 937.

The court of appeals' decision would prohibit the State from enacting new statutes or regulations defining new categories of prison misconduct subject to credit forfeiture in response to evolving penological challenges, and applying those statutes or regulations to the same inmate population that required the state to enact the statute or regulation in the first place. For example, inmates now routinely smuggle cellphones into prisons to engage in various criminal activities, including ordering the killing of witnesses or rival gang members. Smuggling cellphones into prison has become more prevalent over time as the devices themselves have become more accessible and advances in technology have produced smaller, more easily concealed phones. *See* Dr. Tod W Burke and Dr. Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI Law Enforcement Bulletin (July 2010), https://leb.fbi.gov/2010/july/cell-phones-as-prison-contraband.

To combat this threat, effective October 6, 2011, the California Legislature added a new section to the state Penal Code, tripling the forfeiture of conduct credits from 30 to 90 days for any inmate found to possess a cellphone. Cal. Penal Code § 4576. Yet, the court of appeals' decision would immunize every person who committed his crime before October 6, 2011, from such increase—including the same prison population that, by its misconduct, required the state to increase the forfeiture.

The Ninth Circuit's decision effectively gives state prison inmates a constitutional *right* to engage in future serious in-prison misconduct without any consequence to the inmate's credit-earning status (or existing credits), so long as the inmate committed his underlying crime before adopting the rule defining the misconduct (or increasing its consequences). It is not fanciful to suppose that, if this decision becomes the operative law, sophisticated prison gangs would recruit inmates who, based on the timing of their commitment offense, can engage in specific misconduct with relative impunity. The Ex Post Facto Clause was not intended to lead to any such result, or to shield any prisoner from routine and reasonable prospective changes to the rules adopted by state legislatures and prison officials to regulate conduct in state prisons. *Cf., e.g., Weaver*, 450 U.S. at 29 (clause assures that legislative acts give fair warning of their effects).

These consequences of adopting the constitutional reasoning of the court below make the second question presented in this case potentially one of great practical importance. If the decision below is not reversed (and the court's opinion vacated) on AEDPA grounds, then the second question warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JENNIFER A. NEILL
Senior Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
PHILLIP J. LINDSAY
Supervising Deputy Attorney General
Counsel of Record

Dated December 23, 2015

APPENDIX

FILED September 25, 2015

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,
v.
DAVE DAVEY, Acting Warden, *Respondent-Appellee*.
No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW

OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
June 2, 2015—Pasadena, California
Filed September 25, 2015
Before: Ferdinand F Fernandez, Raymond C. Fisher, and Carlos T Bea, Circuit Judges.

Opinion by Judge Bea

OPINION

BEA, Circuit Judge:

Prison gangs threaten the safety and security of prisons and prisoners. California has sought to combat these threats—and punish prison-gang affiliation—by segregating prison-gang members and associates from the general prison population. To that end, California houses prison-gang members and associates in Security Housing Units (SHUs), maximum-security facilities in which prisoners are kept in solitary confinement for over 22 hours a day.

California also encourages good behavior among its prisoners with good-conduct credits that reduce prisoners' sentences. Most prisoners earn credits on a one-to-one basis—for one day of good conduct, they earn one day of credit. So, a prisoner who behaves well can potentially cut his sentence in half. But prisoners can also lose credits, or their credit-earning status can change, based on misconduct. Until 2010, prison-gang members and associates housed in SHUs earned credits at a reduced three-to-one rate. But California amended its penal code in 2010 to modify the credit-earning status of prison-gang members and associates in segregated housing. Those prisoners can no longer earn any credits, regardless their conduct. The amendment thus causes prison-gang members and associates housed in SHUs to serve a longer portion of their prison sentences than they would have under the old regime, effectively increasing their sentences. The issue here is whether the 2010 amendment violates the Ex Post Facto Clause of the United States Constitution when applied to a prisoner whose underlying criminal

offense was committed before that amendment's enactment. We conclude it does.

I

In 2003, petitioner–appellant Antonio A. Hinojosa pleaded guilty in California superior court to first-degree robbery (to which he admitted a firearm enhancement) and participation in criminal-street-gang activity. He was sentenced to 16 years of imprisonment.

In 2009, Hinojosa was "validated" as a "prison-gang associate" and transferred to the SHU at Corcoran. [1] Validation is the process by which inmates are classified as prison-gang members or associates.[2] Once validated, a prison- gang member

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[1] After this appeal was filed, the California Penal Code was amended to replace the term "prison gang" with "Security Threat Group," bureaucratese that is otherwise known by the abbreviation "STG." As such, Hinojosa is no longer a "prison-gang associate" but an "STG associate." For the purposes of this opinion, however, we use the old terminology, which is more accurate here, as STGs may include groups other than prison gangs. The Code also distinguishes between prison-gang members and associates; that distinction is irrelevant to our analysis.

[2] For an inmate to be validated as a prison-gang associate, the California Department of Corrections and Rehabilitations must recognize at least three reliable, documented bases ("independent source criteria items") for concluding that the inmate's background, person, or belongings indicate his active association with other validated prison-gang members or associates. See Cal. Code Regs., tit. 15, § 3378.2(b). At least one of those bases must constitute a direct link to a

(continued...)

or associate "is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an indeterminate term." Cal. Code Regs. tit. 15, § 3341.5(c)(2)(A)(2) (2009). At the time Hinojosa was validated, there were two ways validated prison-gang members and associates could get out of the SHU. The first is going "inactive." An inactive inmate is one who has not been involved in prison-gang activity for a minimum of six years. *Id.* § 3378(e) (2009). Once deemed inactive, the prison's Departmental Review Board may authorize an inmate's transfer out of the SHU, but that decision is discretionary. *See id.* § 3341.5(c)(5) (2009). The Board "is authorized to retain an inactive gang member or associate in a SHU based on the inmate's past or present level of influence in the gang, history of misconduct, history of criminal activity, or other factors indicating that the inmate poses a threat to other inmates or institutional security." *Id.* The second way to get out of the SHU is to "debrief"—what some prisoners might describe as "snitch." [3] The process has two steps: an interview phase and an observation phase. *Id.*§ 3378.1(a) (2009). In the

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(...continued)
current or former validated prison- gang member or associate. *Id.* The evidence presented against Hinojosa consisted of an envelope upon which was written the name of another validated prison-gang associate, a birthday card with gang symbols in it, photographs of Hinojosa's gang-related tattoos, and a report from an institutional gang investigator. Hinojosa does not challenge his validation as a prison-gang associate.

[3] In his petition in district court, Hinojosa asserted that inmates who choose to debrief put themselves and their families in jeopardy of retaliation by other gang members. That may be, but it does not affect our analysis.

interview phase, the inmate must provide staff with "information about the gang's structure, activities and affiliates," as well as "a written autobiography of [his] gang involvement, which is then verified by staff for completeness and accuracy." *Id.* § 3378.1(b)(2009). In the observation phase, inmates are observed for up to twelve months in segregated housing with other inmates undergoing the debriefing process. *Id.* § 3378.1(c) (2009).[4]

Under the version of California Penal Code § 2933.6 in effect at the time of Hinojosa's 2003 conviction and 2009 validation, he was eligible to earn good-conduct credits while housed in the SHU, albeit at a rate lower than prisoners housed in the general population. See Cal. Penal Code § 2933.6(a), (b) (2009); *In re Efstathiou*, 200 Cal.App.4th 725, 728 (2011). But effective January 25, 2010, § 2933.6 was amended to eliminate accrual of credits for inmates, such as Hinojosa, who had been transferred to the SHU upon validation as a prison-gang member or associate. See Cal. Penal Code § 2933.6(a), (b) (2010).

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[4] After briefing of this appeal concluded, California amended its regulations to introduce a third means by which validated prison-gang members and associates can get out of the SHU: the Step Down Program. *See* Cal. Code Regs. tit 15, § 3378.3(a) (2015). The Step Down Program is "an incentive based multi-step process for the management of [prison- gang] affiliates designed to monitor affiliates and assist with transition for return to [the] general population." *Id.* Like debriefing, completing the Step Down Program is a lengthy process that does not entail immediate restoration of a prisoner's credit-earning status. *See id.* §§ 3000, 3341.5(c)(5). 3378.3 (2015). The addition of the Step Down Program to the regulations does not change our analysis.

The amendment did not revoke any credits Hinojosa earned before the effective date of the amendment; it prevented him from accruing any further custody credits while housed in the SHU. As a result of this change in credit-earning status, Hinojosa's minimum release date was extended one year, from September 27, 2015, to September 27, 2016.

After exhausting his administrative remedies, Hinojosa filed a petition for writ of habeas corpus in the Superior Court of California challenging the application of amended § 2933.6 to change his credit-earning status. As recounted by the superior court, Hinojosa presented two claims:

1. The California Department of Corrections and Rehabilitation's retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit violates the terms of petitioner's plea agreement and constitutional right to due process.

2. The California Departments of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.

The superior court addressed these two claims separately, providing "separate and independent grounds" for denying each. As to the first claim, the

superior court held that Hinojosa's plea agreement did not "contain an express promise or guarantee" regarding his credit-earning status and thus that the application of amended § 2933.6 to Hinojosa did not violate the terms of his plea agreement or violate due process. As to the ex post facto claim, the superior court denied it "on grounds [Hinojosa] ha[d] not sought review of his claim of error in the proper judicial venue." The superior court denied his petition.

Hinojosa petitioned the California Court of Appeal and then the Supreme Court of California for a writ of habeas corpus, raising the same claims. Both courts denied his petitions without opinions.

Hinojosa then filed pro se a petition for writ of habeas corpus in the United States District Court for the Central District of California. In his petition, he claimed (1) application of amended § 2933.6 to change his credit earning status violated the Ex Post Facto Clause, and (2) ineffective assistance of counsel for failing to inform him of the chance he would lose his credit-earning status. In his report and recommendation, Magistrate Judge Michael R. Wilner analyzed those claims under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), and recommended denial of Hinojosa's petition. As to the ex post facto claim, Magistrate Judge Wilner concluded the California Superior Court had not unreasonably applied federal law in denying Hinojosa's claim

> because the change in California law neither caused a prisoner to lose earned credits nor punished a prisoner for past

> conduct. Rather, the statute serves to prevent an inmate from earning additional credits based on his "continued status as an active gang member or associate": an inmate may rectify this by dropping out of the gang and cooperating with prison officials.

Magistrate Judge Wilner rejected Hinojosa's ineffective-assistance-of-counsel claim because "no reasonable criminal defense attorney could be faulted for failing to anticipate and advise a client about a future change in the law governing prison credits."

District Judge Gary A. Feess adopted Magistrate Judge Wilner's report and recommendation in full, denied Hinojosa's petition, and dismissed the action with prejudice. Judge Feess denied Hinojosa's request for a certificate of appealability as to either of his claims. Hinojosa timely petitioned us for a certificate of appealability, which we granted only as to "whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause." This appeal followed. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(c).

II

We review de novo the district court's denial of a petition for a writ of habeas corpus. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). And we review de novo the district court's determination that AEDPA applies to a petitioner's claim. *See Id.* at 965.

III

Hinojosa is not the first California prisoner to challenge amended § 2933.6 under the Ex Post Facto Clause. In *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014), *cert. denied sub nom. Nevarez v. Ducart*, U.S. __, 135 S. Ct. 295 (2014), we considered this same question on similar facts. There, we held that AEDPA barred us from granting *Nevarez* relief because the California courts' denial of his ex post facto claim was not "an objectively unreasonable application of clearly established federal law" as determined by the Supreme Court of the United States. 749 F.3d at 1128; see 28 U.S.C. § 2254(d)(1). If AEDPA applies here, we are bound by our decision in *Nevarez* and must affirm the district court's denial of Hinojosa's petition. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). If not, we must consider the merits of his petition.

AEDPA bars us from granting a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). Hinojosa contends that no state court decided his ex post facto claim "on the merits" and thus that AEDPA does not apply. We agree.

The superior court did not decide Hinojosa's ex post facto claim on the merits. It denied the claim because Hinojosa filed it "in the [im]proper judicial

venue." The state conceded as much at oral argument. But the state cites *Harrington v. Richter*, 562 U.S. 86 (2011), and *Johnson v. Williams*, 568 U.S. , 133 S. Ct. 1088 (2013), for the proposition that we must presume the California Supreme Court decided Hinojosa's ex post facto claim on the merits when it summarily denied his petition. That argument fails to comprehend the relationship between *Richter*, whereby we must presume state courts decide federal claims on the merits, see 562 U.S. at 99–100, and *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which directs us to consider the last reasoned decision of the state courts, *see id.* at 806. Where the last reasoned state-court decision rejects a federal claim solely on procedural grounds, any presumption that a subsequent summary denial decided the claim on the merits is rebutted. *See James v. Ryan*, 733 F.3d 911, 915–16 (9th Cir. 2013) cert. denied, 572 U.S. , 134 S. Ct. 2697 (2014); *see also Williams*, 133 S. Ct. at 1094 n.1 ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision "). Here, the last reasoned decision is that of the superior court, which denied Hinojosa's ex post facto claim solely on the ground of improper venue. That determination is not a determination "on the merits." 28 U.S.C. § 2254(d). So, we are not bound by AEDPA.

Nonetheless, if a state court dismisses a federal claim on an independent state procedural ground that is firmly established and regularly followed, we normally will not consider the claim. *Beard v.*

Kindler, 558 U.S. 53, 55, 60–61 (2009). But the state has not raised a state procedural ground as a defense at any stage of Hinojosa's federal proceedings. The defense is thus waived. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." (internal quotation marks and brackets omitted)). And although we may raise procedural default sua sponte, *Windham v. Merkle*, 163 F.3d 1092, 1100–01 (9th Cir. 1998), we decline to do so here. Hinojosa raises a serious question about whether the superior court's dismissal of his claim for improper venue is, in fact, a firmly established and regularly followed rule. *See In re Oluwa*, 255 Cal. Rptr. 35, 37 (Cal. Ct. App. 1989) (holding habeas petition challenging denial of custody credits "is not related to the conditions of . confinement" and was properly brought in the district of conviction); *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976) (holding habeas petition should be transferred, not dismissed, for improper venue). We will not make the state's arguments for it, even only to rebut them. So, we turn to the merits.

IV

"No State shall pass any ex post facto Law " U.S. Const. art. I, § 10, cl. 1. "To fall within the ex post facto prohibition, a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce v. Mathis*, 519 U.S.

433, 441 (1997) (citations omitted). We address these two prongs in turn.

A

A law is retrospective if it "appl[ies] to events occurring before its enactment." *Id.* at 441 (citation omitted). The Supreme Court has instructed that the "critical question is whether the law changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981).[5] But which acts? Hinojosa argues that the

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[5] In *Weaver*, the governing law when petitioner Weaver committed and pleaded guilty to second degree murder permitted all prisoners to earn conduct credits at certain rates. *Id.* at 25–26. That rate was later reduced, and the new rates were applied to all prisoners regardless of when they committed their underlying offenses. *Id.* at 26–27. As a result, all prisoners' minimum release dates were effectively increased, including Weaver's. *Id.* Weaver petitioned the Supreme Court of Florida for a writ of habeas corpus, claiming the application of the new rates to him violated the Ex Post Facto Clause *Id.* at 27. The Florida Supreme Court denied his petition. *Id.* at 27–28.

The United States Supreme Court reversed. For the purposes of retrospectivity, the Court compared the date Weaver committed his underlying criminal offense and the date the new rates went into effect. *Id.* at 31–32; see also *Id.* at 32 ("[A] prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."). The Court then concluded that the new rates disadvantaged Weaver by increasing his prison sentence. *Id.* at 33. The Court concluded "the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its

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relevant conduct is the criminal conduct for which he is incarcerated. The state contends it is Hinojosa's continued prison-gang association.

Our precedent supports Hinojosa's position. Altering a prisoner's ability to earn credits affects the length of his prison term and therefore affects the measure of punishment attached to the original crime. *See United States v. Paskow*, 11 F.3d 873, 879 (9th Cir. 1993) ("[A statute], which forfeited good-time credits upon revocation of parole, violated the prohibition on ex post facto laws because it constituted 'a sanction that extends the time remaining on petitioner's original sentence' rather than a punishment for 'the second offense.' " (quoting *Beebe v. Phelps*, 650 F.2d 774, 776 (5th Cir. Unit A July 1981))); *see also Weaver*, 450 U.S. at 32 ("[A] prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."). For that reason, we have consistently looked to the prisoner's underlying criminal conduct for the purpose of determining whether a law is retrospective. *See Paskow*, 11 F.3d at 877 ("These two factors must be assessed in connection with the date of the defendant's offense, not of his conviction or sentencing."); *Watson v. Estelle*, 886 F.2d 1093, 1096 (9th Cir. 1989) ("The key

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enactment. This result runs afoul of the prohibition against ex post facto laws." *Id.* at 35–36.

ex post facto inquiry is the actual state of the law at the time the defendant perpetrated the offense."); *see also Weaver*, 450 U.S. at 31 (asking whether the statute at issue "applies to prisoners convicted for acts committed before the provision's effective date"). That analysis holds true even where the prisoner commits some intervening misconduct that triggers a change in his credit-earning status. *See Paskow*, 11 F.3d at 878–79 (citing *Greenfield v. Scafati*, 277 F Supp. 644, 644–45 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968) (per curiam)).

Greenfield, which we have adopted as controlling authority,[6] illustrates this principle. As we described that case in *Paskow*:

> In Greenfield, a defendant who was incarcerated following revocation of his parole challenged a statute that prohibited any state parole violator from receiving good- conduct credits during his first six months in custody following [parole] revocation. At the time the defendant committed his underlying crime, all prisoners, including parole violators, could

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[6] Although Greenfield is a decision by a three-judge panel from the District of Massachusetts, the Supreme Court summarily affirmed the decision, and we have since adopted it as binding circuit precedent. *See Paskow*, 11 F.3d at 878. As such, we are bound by Greenfield here, notwithstanding our holding in *Nevarez v. Barnes* that Greenfield "does not qualify as 'clearly established federal law [as determined by the Supreme Court of the United States]' for purposes of AEDPA," 749 F.3d at 1129. As we held above, AEDPA does not apply to Hinojosa's ex post facto claim.

> accumulate good-conduct credits from the beginning of their incarceration. The new statute was adopted after the defendant committed his underlying crime, but before he committed the offense for which his parole was revoked. The three-judge court held that application of the statute to the defendant violated the ex post facto clause, because the statute prevented him from being released as early as he might have been had he been permitted to amass good-conduct credits under the statute in effect *at the time he committed the underlying crime*. Thus, according to the three-judge court and according to the Supreme Court, the statute operated retrospectively and to his detriment. As the three-judge court stated, the effect of the statute was to "extend[] his sentence and increas[e] his punishment" beyond the amount he expected or had notice of when he committed his underlying crime.

Paskow, 11 F.3d at 878–79 (citations omitted). The panel thus concluded: "Because parole eligibility is part of the sentence for the underlying offense, its terms and conditions are fixed at the moment the underlying offense is complete. Therefore, like the length of a term of incarceration, the conditions affecting parole eligibility cannot be retrospectively altered." *Id.* at 879.

The state contends that our decision in *Hunter v. Ayers*, 336 F.3d 1007 (9th Cir. 2003), establishes that the relevant conduct here is Hinojosa's in-prison

misconduct, not his underlying criminal conduct.[7] We disagree. The panel in *Hunter* assumed without deciding that the relevant conduct for the purposes of retrospectivity was Hunter's in-prison misconduct. *See* 336 F.3d at 1012–13. But the panel neither raised nor answered that question. Nor did it have to: regardless whether the relevant date was the date of his in-prison misconduct or the date of his underlying criminal offense, the regulation violated the Ex Post Facto Clause as applied to Hunter.[8] As such, it is no

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[7] In *Hunter*, petitioner Hunter challenged prison regulations that retroactively removed his ability to have conduct credits restored after an infraction. 336 F.3d at 1008–09. Hunter was caught drinking "pruno" (prison wine), a disciplinary offense. *Id.* at 1008. He was docked 120 days of good-conduct credits. *Id.* Under the regulations in place at the time he committed the offense, if he served six months following the offense without another disciplinary offense, half of his forfeited credits would be restored as of right. *Id.* at 1010. But after he committed the pruno offense, the regulations were changed to eliminate restoration of forfeited credits for offenses like Hunter's. *Id.* Hunter challenged the application of the new regulations to him as violating the Ex Post Facto Clause. *Id.* at 1011. Hunter petitioned for a writ of habeas corpus under 28 U.S.C. § 2241, which the district court granted. We affirmed, holding that application of the amended regulations to eliminate restoration of Hunter's credits violated the Ex Post Facto Clause. *Id.* at 1013.

[8] But that distinction matters here. Although Hinojosa's and Hunter's situations seem similar (Hinojosa was validated and transferred to the SHU, then the statute was amended; Hunter committed in-prison misconduct, then the regulation was amended), a key difference distinguishes them. Hunter's pruno violation was completed when he drank the pruno. But according to the California courts, a validated prison- gang associate commits the continuing offense of associating with a prison gang until he debriefs or becomes inactive. *See In re*

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surprise that *Hunter* did not distinguish or even cite any of the cases relevant to that question. To the extent *Hunter's* dicta *does* identify the in-prison infraction as the relevant conduct, we hold that dicta is not "well-reasoned"—indeed, the opinion provides no reasoning—and we decline to follow it. *Cf. United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). Rather, we are bound by the express holdings of *Paskow* and *Weaver* A prisoner's eligibility for early release—whether by means of good-conduct credits or parole—is part of his underlying criminal sentence. *See Weaver*, 450 U.S. at 31–32; *Paskow*, 11 F.3d at 879. And where a prisoner's sentence is effectively increased by new regulations that alter his credit-earning status, that alteration "changes the legal consequences" of his underlying criminal conduct. *Weaver*, 450 U.S. at 31. We therefore hold, in accord with *Paskow* and *Weaver*, that the date relevant to our retrospectivity analysis is the date of the prisoner's underlying criminal conduct. *See Paskow*, 11 F.3d at 878–79; *Weaver*, 450 U.S. at 30–32.

(...continued)
Sampson, 197 Cal. App. 4th 1234, 1242–43 (2011). So, under California law, every moment Hinojosa goes without debriefing is a continuation of his misconduct. And we are bound by the California courts' interpretation of California law. *See Bradshaw v. Ricky*, 546 U.S. 74, 76 (2005) (per curiam). Accordingly, if the relevant date is the date of the in-prison misconduct, and Hinojosa was properly found to have committed in-prison misconduct by affiliating with a prison gang while in prison, § 2933.6 is not retrospective because until there is evidence that he has disaffiliated from that gang, he is continuing his in-prison misconduct.

Applying that principle here, we conclude that amended § 2933.6 is retrospective as applied to Hinojosa. To borrow *Paskow's* language: "At the time [Hinojosa] committed his underlying crime [validated gang associates housed in a SHU] could accumulate good-conduct credits from the beginning of their incarceration." *Paskow*, 11 F.3d at 878. Amended § 2933.6 "was adopted after [Hinojosa] committed his underlying crime" and "prevented [Hinojosa] from being released as early as he might have been had he been permitted to amass good-conduct credits under the statute in effect at the time he committed the underlying crime." *Id.* (emphasis omitted). It thus "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31. [9]

In its answering brief, the state attempts to distinguish this case from *Paskow* and *Weaver* on the ground that amended § 2933.6

> punishes conduct that occurred after the commission of, or the conviction for, the punishable offense. Hinojosa's ineligibility for conduct credit accrual is not punishment for the offense of which he was convicted. . [I]t is punishment for gang-related conduct that occurred after January 25, 2010.

See also In re Sampson, 197 Cal. App. 4th at 1242 ("[P]etitioner's ineligibility for conduct

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[9] Although the record does not contain the date of Hinojosa's underlying criminal offense, it was certainly before he pleaded guilty to that conduct in 2003.

> credit accrual is not punishment for the offense of which he was convicted...It is punishment for gang-related conduct that continued after January 25, 2010.").

We do not question whether California can punish prison misconduct, including prison-gang-related misconduct, through administrative disciplinary procedures. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 222–23 (2005) (holding that administrative punishment does not implicate a liberty interest protected by the Fifth Amendment unless the punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995))). And we acknowledge that most administrative punishments—for example, segregated housing, loss of visitation privileges, restricted (and unpleasant) diets, and reduced exercise or social time—generally will not implicate the Ex Post Facto Clause. So long as an administrative punishment is in place before a prisoner commits the punishable prison misconduct, imposition of such punishment does not change the legal consequences of any prior acts. But administrative punishments that effectively extend a prisoner's sentence—such as revocation of good-conduct credits or change in credit-earning status—are another story. A prisoner's term of imprisonment is punishment for his underlying criminal conduct. So, an administrative punishment that effectively extends a prisoner's sentence goes beyond punishing prison misconduct. It changes the legal consequences of his underlying criminal conduct. If that conduct was committed before the administrative punishment

was enacted, the punishment is retrospective. *See Weaver*, 450 U.S. at 32–33.[10]

The state is correct: Hinojosa's "gang-related misconduct" occurred after, and is separate from, his underlying crimes. But in punishing Hinojosa for his in-prison gang-related misconduct, the state has effectively increased his prison sentence for his underlying crimes. And it has done so by means of a regulation that was enacted after Hinojosa committed those crimes. Amended § 2933.6 is thus retrospective as applied to Hinojosa.

B

Not all retrospective laws are unconstitutional. A retrospective law does not violate the Ex Post Facto Clause unless it " 'disadvantage[s] the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." *Lynce*, 519 U.S. at 441 (citation omitted). But an increase in punishment need not be an increase in the maximum term of imprisonment. As the Supreme Court explained in *Weaver*, a new regulation that changes an inmate's ability to earn good-conduct credits increases his punishment if the "new provision constricts the inmate's opportunity to earn early release." *Weaver*, 450 U.S. at 35–36.

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[10] Of course, the opposite is also true. If, at the time a prisoner commits his crime, regulations provide that prisoners may lose credit-earning status as a consequence of prison misconduct, there is no ex post facto violation.

Citing *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), the state argues that Hinojosa's risk of an increased sentence is "too attenuated" to rise to an ex post facto violation. 514 U.S. at 514. We disagree and distinguish *Morales*. Under the law in place when petitioner Morales murdered two people and pleaded guilty to those crimes, parole-eligible inmates were entitled to yearly parole-board hearings. *Id.* at 502–03. But while Morales was incarcerated, the state changed the law to "authorize[] the Board [of Parole Hearings] to defer subsequent suitability hearings for up to three years if the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.' " *Id.* at 503 (citation omitted). At his first parole hearing in 1989, the board issued a reasoned decision finding it was not reasonable to expect that parole would be granted in the following years. *Id.*at 502–03. It scheduled Morales's next hearing for 1992. *Id.* at 503.

Morales filed a petition for habeas corpus in federal district court, which the district court denied. *Id.* at 504. We reversed, holding that "any retrospective law making parole hearings less accessible would effectively increase the [prisoner's] sentence and violate the ex post facto clause." *Id.* (citation omitted). The Supreme Court reversed us, drawing a clear distinction between cases like *Weaver*, where a retrospective law directly results in an increased prison sentence, and cases like *Morales*, where the amended statute "creates only the most speculative and attenuated risk of increasing the

measure of punishment attached to the covered crimes." *Id.* at 514.

This case falls under *Weaver*, not *Morales*. Whereas the amended statute in Morales did not change the "substantive formula" for reducing the statutory sentencing range or the standards for determining parole suitability, *Id.* at 507, amended § 2933.6 expressly alters the "substantive formula" for awarding good-conduct credits to prisoners, like Hinojosa, who have been validated as prison-gang members or associates. That change is not speculative; it has effectively increased Hinojosa's prison time by one year.

The state argues alternatively that Hinojosa is not disadvantaged by amended § 2933.6 because he "could always choose to opt out of a prison gang." If he did, the state suggests, he would be out of the SHU and back in the general population, earning credits at the same rate as everyone else. But it is not so easy. One does not simply "opt out" of a prison gang. Hinojosa cannot stop being a prison-gang associate in the eyes of the state unless he waits six years or debriefs. And aside from the fact that a prisoner who debriefs may claim to face death or serious injury at the hands of his former compatriots, the entire debriefing process can take well over a year. *See In re Sampson*, 197 Cal. App. 4th at 1240. The state has made no representation that Hinojosa would necessarily regain his prior credit-earning status upon beginning—or even completing—the process. Nor is there any provision by which Hinojosa could have the credits he is denied while debriefing reinstated once he completes the process.

But even if Hinojosa could easily opt out of his prison gang, the amended statute would still disadvantage him. We look at the effect amended § 2933.6 has on Hinojosa now, all other things being equal. The question is: if Hinojosa does not change his conduct—if he continues doing what he was doing before § 2933.6 was amended—is his prison time effectively lengthened? The answer is yes. Amended § 2933.6 thus works to his disadvantage. Were we to hold otherwise, the state could impose any manner of new requirements upon prisoners, who would have to comply simply to retain the same credit-earning status they enjoyed before the new requirements were enacted. *See Weaver*, 450 U.S. at 34–35 (rejecting the state's argument that Weaver could make up for his change in credit-earning status by performing "special behavior" to earn credits). Such a result would be irreconcilable with the Ex Post Facto Clause's protection against "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* at 30. For just as retroactively altering "a prisoner's eligibility for reduced imprisonment" can disadvantage a prisoner, *id.* at 32, so can new conditions placed on that eligibility.

* * *

In conclusion, we emphasize what we hold today—and what we do not. We do not question whether the state can enact a new statute punishing in-prison misconduct. Nor do we question here whether the state can apply that new statute to

prisoners whose underlying criminal conduct predates the statute's enactment. But the state cannot use such a statute retroactively to effect an increase in prison time. The Ex Post Facto Clause forbids it.

V

Amended § 2933.6 violates the Ex Post Facto Clause as applied to prisoners, like Hinojosa, who committed their underlying criminal conduct before the amendment's enactment. Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to GRANT the writ of habeas corpus. The writ will direct the state to release Hinojosa on the date he would have been released under the version of § 2933.6 that was in place prior to January 25, 2010. *See Weaver*, 450 U.S. at 36 n.22.

No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P 2.

REVERSED and REMANDED.

FILED November 17, 2015

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,

v.

CONNIE GIPSON, Warden, *Petitioner-Appellee*,

No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW
Central District of California, Santa Ana

ORDER

Before: FERNANDEZ, FISHER and BEA, Circuit Judges.

The motion to recall the mandate is DENIED. Therefore, the petition for rehearing en banc will not be entertained.

FISHER, Circuit Judge, concurring:

Whether the state has demonstrated "exceptional circumstances" justifying recall of the mandate is a close question. *See Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). The policy of this court is "that time should be allowed after entry of judgment for the filing of a petition for rehearing en banc." Gen. Order 4.6(a). We found "[e]xceptional circumstances" that justified issuing the mandate forthwith, *see* Gen. Order 4.6(b), depriving the state of the opportunity to file a

petition for rehearing through no fault of its own. The emergency situation that caused us to issue the mandate forthwith has now abated, so no party would suffer undue prejudice were the state's motion granted.

Nonetheless, having considered the totality of the circumstances, and given that the state's proposed petition for rehearing en banc lacks merit, I agree with my colleagues that this is not "the exceptional case requiring recall of the mandate in order to prevent an injustice." *Nevius v. Sumner*, 105 F.3d 453, 460 (9th Cir. 1996) (quoting *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977)). I therefore concur in the order denying the motion to recall the mandate.

FILED February 3, 2014

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, *Petitioner-Appellant*,

v.

CONNIE GIPSON, Warden, *Petitioner-Appellee*,

No. 13-56012
D.C. No. 8:12-cv-00965-GAF-MRW
Central District of California, Santa Ana

ORDER

Before: BERZON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the 2010 amendment to California Penal Code § 2933.6, which deprives a prisoner of a future opportunity to earn an earlier release, violates the Ex Post Facto Clause. See 28 U.S.C. § 2253(c)(3); see also 9th Cir. R. 22-1(e). This issue is similar to that raised in Nevarez v. Lewis, Appeal No. 12-17060.

A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days of the filing date of this order, appellant shall either (1) pay to the district court the $455.00 filing and docketing fees for this appeal and file in this court proof of such payment, or (2) file in this court a motion to proceed in forma pauperis, accompanied by a completed Form CJA 23. Failure to

pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

If appellant moves to proceed in forma pauperis, appellant may simultaneously file a motion for appointment of counsel.

The Clerk shall serve a copy of Form CJA 23 on appellant.

If appellant pays the fees, the following briefing schedule shall apply: the opening brief is due April 8, 2014; the answering brief is due May 8, 2014; the optional reply brief is due within 14 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

If Connie Gipson is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P 43(c).

FILED May 15, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
vs.
CONNIE GIPSON, Warden, Respondent.

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

DATE: May 15, 2013

S/ Gary Feess
HON. GARY A. FEESS
UNITED STATES DISTRICT JUDGE

FILED May 15, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
vs.
CONNIE GIPSON, Warden, Respondent.

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying the petition and dismissing this action with prejudice.

Dated: May 15, 2013

S/ Gary Feess
HON. GARY A. FEESS
UNITED STATES DISTRICT JUDGE

FILED March 28, 2013

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SA CV 12-965 GAF (MRW)

ANTONIO A. HINOJOSA, Petitioner,
v.
CONNIE GIPSON, Warden, Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Gary A. Feess, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF RECOMMENDATION

This is a state habeas action. Petitioner pled guilty to robbery and street terrorism charges. He contends that a post-conviction change in state law regarding the calculation of good time credits violates the Ex Post Facto Clause. Petitioner also claims that his lawyer provided ineffective assistance of counsel at the time of the guilty plea by failing to advise him about the possibility of a future change in the law regarding the calculation of credits.

The Court concludes that these arguments are insufficient to justify relief. The Court therefore recommends that the petition be denied..

II. FACTS AND PROCEDURAL HISTORY

In 2003, Petitioner pled guilty to robbery and street terrorism charges.

Pursuant to a plea agreement, Petitioner agreed to a sentence of 16 years in prison.

In 2010, California Penal Code section 2933.6 became effective. That statute limited a prisoner's eligibility to earn good time credits toward early release from custody if the prisoner had been validated as a prison gang member or was assigned to segregated housing due to misconduct. The statute applies to the future earning of credits, but does not eliminate credits that an inmate previously earned.

Petitioner was validated as a member of a prison gang in 2009 and placed in segregated housing. Before the statute's enactment, Petitioner anticipated that he would be released in 2015. However, after the change in law in 2010, prison officials informed Petitioner that his release would be in 2016 due to his inability to earn additional good time credits.

Petitioner sought habeas relief in the state courts. The state superior court concluded that there was no violation of Petitioner's original plea agreement that could lead to relief. (Lodgment # 4.) The state appellate and supreme courts denied relief

on a variety of claims without comment. This federal habeas action followed.[1]

III. DISCUSSION

A. Standard of Federal Court Review Under AEDPA

Petitioner's claims are subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

In a habeas action, this Court reviews the state court's last reasoned decision. Maxwell v. Roe, 628 F.3d 486, 495 (9th Cir. 2010). Here, the Orange

---

[1] The Court previously denied without prejudice the Attorney General's motion to dismiss the federal petition as untimely. The Attorney General did not renew the dismissal request, and responded to the merits of the petition instead.

County Superior Court's opinion (Lodgment # 4) stands as the last reasoned decision for some of Petitioner's claims. As to Petitioner's remaining claims, where the state court issued no reasoned decision, this Court must perform an "independent review of the record to ascertain whether the state court decision was objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (quotation omitted). Nevertheless, such a decision is presumed to be on the merits of Petitioner's claims, and is reviewed for its reasonableness under AEDPA. Harrington v. Richter, __U.S.__, 131 S. Ct. 770, 784 (2011).

Overall, Section 2254(d) presents "a difficult to meet [ ] and highly deferential standard for valuating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, __U.S.__, 131 S. Ct. 1388, 1398 (2011) (quotations omitted). On habeas review, AEDPA places on Petitioner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Richter, 131 S. Ct. at 786-87.

Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Richter, 131 S. Ct. at 786. Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." (Id.)

B. Ex Post Facto Claim

The Ex Post Facto Clause prohibits the enactment of a law that punishes an act not punishable at the time it was committed, or imposes additional punishment than prescribed when the act was committed. For a law to violate the ex post facto prohibition, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). A change in the law is disadvantageous if it is "more onerous than the law in effect on the date of the offense. Id. at 30-31. A statute that retroactively revokes previously-awarded credits violates the Ex Post Facto Clause, as it has "the effect of lengthening [the prisoner's] period of incarceration." Lynce v. Mathis, 519 U.S. 433, 443, 447 (1997) (statute "did more than simply remove a mechanism that created an opportunity for early release") (emphasis in original).

To date, no federal court has found Section 2933.6 to be unconstitutional. See, e.g., Corral v. Gonzalez, No. CV 12-1315 LJO (SKO), 2013 WL 635933 24 (E.D. Cal. Feb. 20, 2013); Smith v. Holland, No. CV 12-1529 BAM, 2012 WL 255387366 (E.D. Cal. Nov. 1, 2012); Munoz v. Lopez, No. CV 12-1180 BAM, 2012 WL 3260475 (E.D. Cal. Aug. 8, 2012); Saavedra v. Cate, No. CV 12-796 GSA, 272012 WL 1978846 (E.D. Cal. June 1, 2012). All of these courts concluded that the change in California law neither caused a prisoner to lose earned credits nor punished a prisoner for past conduct. Rather, the statute serves to prevent an inmate from earning additional credits based on his "continued status as

an active gang member or associate": an inmate may rectify this by dropping out of the gang and cooperating with prison officials. Corral, 2013 WL 635933, at *8.

The Court agrees. Petitioner has not lost the good time credits that he earned before the change of the statute. As a result, his release date will be calculated based on those credits. Although the Penal Code was revised after he was found to be a gang member, Petitioner had the opportunity to renounce his gang affiliation – and resume the favorable earning of release credits – if he choses to do so. The change of statute therefore has not extended the term of his incarceration or served to punish his past conduct in prison. Petitioner certainly will not serve longer than the 16-year prison term originally imposed upon him as reduced by his earned credits. The state courts did not err in rejecting his ex post facto challenge to the statute.

C. Ineffective Assistance of Counsel Claim

Petitioner contends that his lawyer provided ineffective assistance of counsel by failing to advise Petitioner at the time of his plea that Petitioner might not earn the full amount of good time credits under then-existing law.

To establish an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984), "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). A reviewing court applies this standard in all contexts, including

advice regarding a plea agreement. Premo v. Moore, __U.S.__, 131 S. Ct. 733 (2011). Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U. S. at 688. As to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, __U. S.__, 130 S. Ct. 1473, 1482 (2010) (quotation omitted). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002). The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Richter, 131 S. Ct. at 788 (quotation omitted). Under such a review, a habeas court must determine "what arguments or theories supported or, as here, could have supported, the state court's decision" to reject the ineffective assistance claim, even in the absence of a reasoned opinion from that court. Id. at 786 (emphasis added).

Further, there is a fundamental interest in the finality of guilty pleas. United States v. Timmreck, 441 U.S. 780 (1979). If a guilty plea is "too easily set aside," the basic principles of acknowledging guilt and accepting responsibility under the law "erode." Premo, 131 S. Ct. at 741. Courts "must have assurance that a plea will not be undone years later because of infidelity to the requirements of AEDPA and the teachings of Strickland." Id. at 742. "The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works

against the party alleging inadequate assistance." Id. at 745.

Petitioner pled guilty in 2003. His plea agreement made no express reference or guarantee regarding the rate by which he would earn good time credits while in custody. (Lodgment # 4 at 2.) The statutory change at issue in this case occurred approximately seven years later. Based on these undisputed facts, no reasonable criminal defense attorney could be faulted for failing to anticipate and advise a client about a future change in the law governing prison credits. Moreover, Petitioner offers no proof or convincing argument that he was prejudiced in any way, or would have refused to enter into the agreement had he known of the as-yet-unenacted change of law. The state courts objectively did not unreasonably apply federal law in denying relief on Petitioner's speculative ineffective assistance of counsel claim.[2]

IV RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

---

[2] Petitioner's broad claim that the state breached the plea agreement fails to raise a cognizable federal constitutional issue and is entirely unsupported by the factual record.

DATED: March 28, 2013

S/ Michael R. Wilner
HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

Appellate Courts Case information

Supreme Court

Court data last updated: 07/08/2012 12:05 PM

Docket (Register of Actions)

HINOJOSA, (ANTONIO ARROYO) ON H.C.
Case Number S198455

Date	Description	Notes
12/05/2011	Petition for Writ of habeas corpus filed	Petitioner: Hinojosa, Antonio Arroyo Pro Per
12/06/2011	Exhibits Lodged	
04/11/2012	Petition for Writ of habeas corpus denied	

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FILED OCTOBER 18, 2005

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re ANOTONIO ARROYO-HINOJOSA
on Habeas Corpus

G045734

(Super. Ct. 02CF0469)

O R D E R

THE COURT:*

The petition for a writ of habeas corpus is DENIED.

s/O'Leary, J.
O'LEARY, ACTING P.J.

* Before O'Leary, Acting P J., Aronson, J., and Ikola, J.

FILED July 8, 2011

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

In re ANOTONIO ARROYO-HINOJOSA
on Habeas Corpus

Orange County Superior Court Case Number:
M-13365 (02CF0469)

ORDER DENYING
HABEAS CORPUS

TO THE OFFICE OF THE CALIFORNIA ATTORNEY GENERAL AND PETITIONER:

HAVING REVIEWED THE ABOVE CAPTIONED PETITION FOR WRIT OF HABEAS CORPUS, THE COURT MAKES THE FOLLOWING ORDER

On July 1, 2003, petitioner pled guilty and was convicted of first degree robbery [Pen. Code, § 211/§ 212.5(a)/§ 213(a)(1)(A)]committed through the personal use of a firearm [Pen. Code § 12022.53(b)] and terrorism [Pen. Code 18186.22(a)]. Petitioner further admitted having sustained a prior strike conviction pursuant to Penal Code § 667(d)(e)(1). Petitioner was sentenced to a term of 16 years in state prison with 604 total days (525 + 79) of pre-sentence credit for time served.

Petitioner seeks habeas corpus relief claiming:

1. The California Department of Corrections and Rehabilitation's retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit violates the terms of petitioner's plea agreement and constitutional right to due process.

2. The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.

The petition is denied on the following separate and independent grounds:

The petition, as it pertains to petitioner's first claim of error, is without merit and denied on this basis. No violation of petitioner's plea agreement is established. Though petitioner is eligible to earn 15% conduct credit based on the nature of his crimes pursuant to Penal Code § 2933. 1(a), petitioner's plea agreement does not contain an express promise or guarantee that petitioner would earn 15% conduct credit against his term of imprisonment regardless of subsequent events that might occur while petitioner is serving his sentence. "A plea agreement violation claim depends upon the actual terms of the agreement, not the subjective understanding of the

defendant or deficient advice provided by his attorney." (*In re Honesto* (2005) 130 Cal. App4th 81, 92.)

To the extent petitioner maintains the trial court should have advised him of the possibility future changes in the law might adversely impact his eligibility for conduct credit, such contention is without merit. A trial court is not required to advise a criminal defendant of collateral consequences that might result from a guilty plea and conviction (*People v. Moore* (1998) 69 Cal.App.4th 626, 630.)

The petition, as it pertains to petitioner's second claim of error is denied on grounds petitioner has not sought review of his claim of error in the proper judicial venue. Petitioner claims the Department of Corrections and Rehabilitation has improperly validated petitioner as a prison gang associate which in turn has resulted in the allegedly unlawful denial of prison conduct credit while petitioner is housed in a security housing unit. Petitioner's claim is essentially a challenge to a condition of confinement. In petitioner's case, that would be the Kings County Superior Court.

"Although any superior court has jurisdiction to entertain and adjudicate a petition for writ of habeas corpus, it does not follow that it should do so in all instances." Challenges to conditions of an inmate's confinement should be entertained by the superior court of county wherein the inmate is confined. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347.)

The petition for writ of habeas corpus is DENIED.

DATED: May 15, 2013

s/ Craig E. Robinson
Craig E. Robinson
Judge of the Superior Court

ORIGINAL

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
FEB 29 2016
OFFICE OF THE CLERK

No. 15-833

IN THE

Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Petitioner,

v.

ANTONIO A. HINOJOSA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

HILARY POTASHNER
Federal Public Defender
GIA KIM*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4408
Facsimile: (213) 894-0081
Gia_Kim@fd.org

Attorneys for Respondent
**Counsel of Record*

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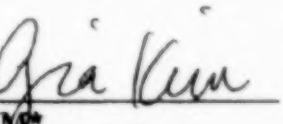
Respondent, by his undersigned counsel, asks leave to file the attached Brief for Respondent in Opposition without prepayment of costs and to proceed in forma pauperis. Respondent was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: February 29, 2016

By: 
GIA KIM*
Deputy Federal Public Defender
Attorneys for Respondent
**Counsel of Record*

No. 15-833

IN THE

Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Petitioner,

v.

ANTONIO A. HINOJOSA

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

HILARY POTASHNER
Federal Public Defender
GIA KIM*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4408
Facsimile: (213) 894-0081
Gia_Kim@fd.org

Attorneys for Respondent
* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that *Ylst*'s "look through" presumption applies when the state court record includes at least one reasoned decision, and that the State failed to adduce sufficient evidence to rebut the presumption in this case.

2. Whether the court of appeals correctly concluded that the statutory elimination of custody credits upon validation as a prison gang member or associate violated the Ex Post Facto Clause, when Respondent committed his offense of conviction and was validated as a prison gang associate before the amendment was enacted.

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INTRODUCTION

Faithfully applying this Court's longstanding precedent in *Ylst v. Nunnemaker*, the court of appeals properly looked through the California Supreme Court's and California Court of Appeal's unexplained denials of habeas relief to the last reasoned opinion, that of the California Superior Court. There it found a procedural decision, not a decision on the merits, and accordingly declined to apply the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Petitioner does not dispute that, as a general matter, *Ylst* remains good law. Instead, Petitioner quibbles with the court of appeals' application of *Ylst*'s correctly stated rule. The court of appeals did not err. But even if it did, a case-specific exercise in error correction does not merit this Court's review, particularly when that analysis turns on details of California habeas procedure that Petitioner never brought to the court of appeals' attention.

The decision does not squarely conflict with other circuits' factbound applications of the Ex Post Facto Clause to changes to different custody credit laws in different states, and the issue arises only rarely. In light of intervening case law, it is unclear whether the California Supreme Court would extend its 1985 decision in *In re Ramirez* to amended Section 2933.6. Any conflict with *Ramirez* will, in any event, have little to no practical impact on prison management, civil liability, or the release date of other prisoners. And, given California's ongoing legislative and administrative efforts to dismantle the segregated housing and credit-earning schemes at issue here, the court of appeals' decision is likely to have limited prospective significance. This Court's intervention is not warranted.

STATEMENT OF THE CASE

I. 2003 CONVICTION AND SENTENCE

On July 17, 2003, Respondent Antonio Hinojosa pleaded guilty in the Superior Court of California, County of Orange, to first-degree robbery, with a firearm enhancement, and participation in criminal street gang activity, and was sentenced to sixteen years in state prison. (ER 289-292.)

II. 2009 GANG VALIDATION AND PLACEMENT IN THE SECURITY HOUSING UNIT ("SHU")

The Security Housing Unit, or SHU, is one of the special housing units in California prisons "designated for extended term programming of inmates not suited for general population." Cal. Code Regs. tit. 15, § 3341.5 (2010).[1] An inmate found guilty of a "serious" offense may be placed in the SHU for a determinate term. *Id.* § 3341.5(c)(2)(B)(1) (2010). Pursuant to regulation, however, a validated prison gang member or associate "is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an *indeterminate* term." *Id.* § 3341.5(c)(2)(A)(2) (2010) (emphasis added).

Hinojosa was validated as a prison gang associate on April 20, 2009. (ER 304.) California regulations define an "associate" as someone who, "based on

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[1] Hinojosa filed his federal habeas petition on June 15, 2012. (ER 262.) Since then, the California regulations dealing with gang validation and SHU placement have been renumbered, relocated, and substantively amended. *See* California Department of Corrections and Rehabilitation, Security Threat Group (STG) Information, http://www.cdcr.ca.gov/stg/ (last visited Feb. 26, 2016) ("Since 2012, CDCR has implemented significant reforms to the way it manages [Security Threat Groups] and validates inmates in the Security Housing Unit (SHU). CDCR's reforms have lessened its reliance on segregated housing for managing validated inmates."). The procedures and terminology set forth here reflect the regulations in place on January 25, 2010, the date amended Section 2933.6 went into effect.

documented evidence, is involved periodically or regularly" with gang associates or members; a "member" is defined as an inmate who has been "accepted into membership" by a gang. Cal. Code Regs. tit. 15, §§ 3378(c)(3), (c)(4) (2010).[2] The evidence underlying Hinojosa's violation consisted of the following items: (1) a reference to Hinojosa's alleged gang moniker in correspondence between a validated Mexican associate and a third party who was not in prison, and Hinojosa's possession of an envelope bearing the name and address of that third party; (2) Hinojosa's address book, which contained the name and inmate number of a validated gang associate; (3) a birthday card bearing a Mexican Mafia symbol; and (4) photographs of Hinojosa's allegedly gang-related tattoos, which were taken on July 25, 2008. (ER 304, 411-422.) The envelope, address book, and birthday card were found during a search of Hinojosa's cell on February 26, 2009. (ER 414, 420, 422.) As a result of his validation, Hinojosa was transferred to the SHU at California State Prison, Corcoran, on September 21, 2009. (ER 301.)

A validated gang member or associate will be considered for "review of inactive status" and release from the SHU "when the inmate has not been identified as having been involved in gang activity for a minimum of six (6) years." Cal. Code Regs. tit. 15, § 3378(e) (2010); *see also id.* § 3341.5(c)(5) (2010) ("The term inactive means that the inmate has not been involved in gang activity for a minimum of six (6) years."); § 3341.5(c)(6) (2010) ("Current activity is defined as, any documented gang activity within the past six (6) years."). In other words, under the regulations

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[2] These definitions were subsequently relocated to Cal. Code Regs. tit. 15, § 3378.2(b).

in place at the time Hinojosa was validated, his possession of the envelope, address book, and birthday card on February 26, 2009 would count as "current" gang activity until February 25, 2015.

A validated inmate may also show that he or she has dropped out of a gang by undergoing a process known as "debriefing." Cal. Code Regs. tit. 15, § 3378.1 (2010). Debriefing involves a two-step process consisting of an interview phase and an observation phase. Cal. Code Regs. tit. 15, § 3378.1(a) (2010). In the interview phase, the inmate must provide staff with "information about the gang's structure, activities and affiliates," as well as "a written autobiography of their gang involvement, which is then verified by staff for completeness and accuracy." Cal. Code Regs. tit. 15, § 3378.1(b) (2010). In the observation phase, inmates are observed for up to twelve months in a housing setting with other inmates undergoing the debriefing process. Cal. Code Regs. tit. 15, § 3378.1(c) (2010). Hinojosa alleged in his petition that debriefing places an inmate in jeopardy of retaliation from gang members and does not ensure release from the SHU or restoration to credit-earning status. (ER 406.)

III. 2010 AMENDMENT TO CALIFORNIA PENAL CODE § 2933.6

Under the version of California Penal Code § 2933.6 in effect at the time of Hinojosa's 2003 conviction and 2009 validation as a gang associate, an inmate placed in SHU was eligible to earn custody credits unless the SHU placement resulted from one of fourteen types of serious misconduct, ranging from murder to intentional destruction of state property during a riot, enumerated in Section

2933.6(b). Cal. Penal Code § 2933.6(a), (b) (2009). SHU placement resulting solely from gang validation did not disqualify an inmate from earning custody credits. *Id.*

Effective January 25, 2010, Section 2933.6 was amended to eliminate custody credits for inmates, including Hinojosa, who had been placed in a SHU upon validation as a gang member or associate. Cal. Penal Code § 2933.6(a) (2010). Under the new legislation, such inmates were placed in zero-credit earning status. (ER 294-295.)

On February 25, 2010, Hinojosa appeared before the prison's Institutional Classification Committee. (ER 305.) In accordance with the regulations defining "current" as "within the past six (6) years," Cal. Code Regs. tit. 15, §§ 3341.5(c)(5), 3341.5(c)(6); 3378(e) (2010), the Committee did not review and update Hinojosa's gang status at that time, because the "most recent gang activity documented" was "not more than six years old." (ER 305.) Instead, the Committee elected to retain Hinojosa in the Corcoran SHU for an indeterminate term "due to gang validation" and placed him in zero-credit earning status as of January 25, 2010 -- the effective date of amended Section 2933.6. (ER 305, 364.)

As a result of the change in law, Hinojosa's minimum release date was extended by exactly a year, from September 27, 2015, to September 27, 2016. (ER 299, 305.) Hinojosa did not forfeit any custody credits earned prior to the statute's effective date of January 25, 2010. (ER 364.)

IV. STATE HABEAS PROCEEDINGS

After exhausting his administrative remedies, Hinojosa filed a habeas corpus petition in Orange County Superior Court on May 30, 2011. (ER 16-91, 307-320.)

Hinojosa presented the ex post facto claim in Ground One of his Superior Court habeas petition. (ER 18.) Acting pro se, he summarized Ground One as follows: "The California Legislation Senate Bill-18, enactment of 1/25/10 to forfeited petitioner's credit earning violated petitioner plea agreement with this court and the ex post facto constitution." (ER 18.) In the body of the petition, he cited both Ex Post Facto Clauses in Article I of the United States Constitution, as well as *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis*, 519 U.S. 433 (1997), leading cases on the ex post facto prohibition as applied to custody credits, and he discussed how those authorities made it unconstitutional to apply amended Section 2933.6 to his pre-enactment conduct. (ER 22, 25, 39-46.) Hinojosa also made clear that he was not challenging the underlying prison gang validation in this proceeding, as the validation was the subject of a separate state habeas petition. (ER 21, 34.) In Ground Two, Hinojosa raised due process arguments alleging that the application of amended Section 2933.6 violated his plea agreement. (ER 29, 36, 49-51.)

The Superior Court denied the petition in a reasoned decision on July 8, 2011. Pet. App. 42a-45a. It understood Mr. Hinojosa's petition as presenting two claims. The Superior Court considered "petitioner's first claim of error," generally corresponding to Ground Two of the petition, as arguing that amended Section 2933.6 "violates the terms of petitioner's plea agreement and constitutional right to due process." Pet. App. 43a. It denied the due process claim on the merits in a reasoned decision. Pet. App. 43a-44a.

The Superior Court summarized "petitioner's second claim of error" as follows:

> **The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.**

Pet. App. 43a. It denied this claim "on grounds petitioner has not sought review of his claim of error in the proper judicial venue." Pet. App. 44a. Citing the California Supreme Court's decision in *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976), the Superior Court reasoned that Hinojosa's claim of improper gang validation resulting in the denial of conduct credits "is essentially a challenge to a condition of confinement" that should be entertained in the superior court of confinement (Kings County), not in the superior court of conviction (Orange County). Pet. App. 44a.

Hinojosa then filed an original habeas petition raising the ex post facto claim in the California Court of Appeal on September 2, 2011. (ER 98-179.) The petition was denied without comment on October 11, 2011.[3] (ER 4.)

Following the California Court of Appeal's denial, Hinojosa filed an original habeas petition in the California Supreme Court on December 5, 2011. (ER 180-261.) The California Supreme Court denied the petition without comment on April 11, 2012. Pet. App. 40a.

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[3] Although Petitioner's Appendix correctly reproduces the text of this order, it incorrectly reproduces the filing date as "October 18, 2005." Pet. App. 41a.

V. FEDERAL HABEAS PROCEEDINGS

Hinojosa filed a pro se federal habeas petition on June 15, 2012. (ER 262-340.) As relevant here, the first ground of the federal petition raised the ex post facto claim presented to the California courts. (ER 268-274.)

The magistrate judge filed a report and recommendation on March 28, 2013. Pet. App. 31a-39a. As relevant here, the magistrate judge concluded that the California Superior Court's opinion represented the last reasoned decision for "some" of Hinojosa's claims. Pet. App. 34a. Although the magistrate judge did not explain what he believed to be the Superior Court's basis for denial of the ex post facto claim, it is clear that the magistrate judge treated all of the claims in Hinojosa's federal petition as subject to the deferential standards in 28 U.S.C. § 2254(d), as amended by AEDPA, and recommended denial of the petition. Pet. App. 33a-34a. The district court adopted the findings and recommendation of the magistrate judge and entered a judgment denying relief. Pet. App. 29a-30a.

The court of appeals reversed, with Judge Carlos T. Bea writing for the unanimous panel, which also included Judge Ferdinand F. Fernandez and Judge Raymond C. Fisher. Pet. App. 1a-3a. The court of appeals began by noting that it had rejected a similar ex post facto challenge to amended Section 2933.6 under AEDPA, in *Nevarez v. Barnes*, 749 F.3d 1124 (9th Cir. 2014). Pet. App. 9a. It then proceeded to explain that Section 2254(d) of AEDPA did not apply to Hinojosa's claim because the California Superior Court denied the ex post facto claim on the procedural ground of improper venue, not on the merits. Pet. App. 9a-10a. The court of appeals rejected the State's argument that this Court's decisions in

Harrington v. Richter, 562 U.S. 86 (2011) ("*Richter*"), and *Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088 (2013), silently abrogated the "look through" presumption adopted in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). Pet. App. 10a. After looking through to the Superior Court's decision, which rested on a procedural ground, the court of appeals concluded that any presumption that the higher courts' summary denials were on the merits had been rebutted. Pet. App. 10a. Because the State did not raise a procedural default defense, the court of appeals turned to the merits of the ex post facto claim. Pet. App. 10a-11a.

Citing this Court's decision in *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), the court of appeals considered whether amended Section 2933.6 was both retrospective and disadvantageous. Pet. App. 11a-12a. As to retrospectivity, the court of appeals noted that this Court "has instructed that the 'critical question is whether the law changes the legal consequences of acts completed before its effective date.'" Pet. App. 12a (quoting *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). To answer this question, the court of appeals had to determine "which acts" counted for purposes of retrospectivity analysis -- the original criminal conduct resulting in incarceration, as Hinojosa argued, or Hinojosa's prison-gang association, which the State claimed was ongoing. Pet. App. 12a-13a.

On de novo review, the court of appeals concluded that under its precedent in *United States v. Paskow*, 11 F.3d 873 (9th Cir. 1993), and this Court's decision in *Weaver*, the date of the inmate's underlying criminal conduct was the relevant date for ex post facto purposes. Pet. App. 17a. In *Weaver*, this Court held that a Florida

statute reducing the amount of available "gain time," or custody credits, was retrospective even though, on its face, it applied only after its effective date. 450 U.S. at 31. *Paskow* held that an amendment to the federal supervised release statute, 18 U.S.C. § 3583, which imposed a new mandatory minimum revocation sentence, violated the Ex Post Facto Clause as applied to a defendant who was convicted before the amendment but violated supervised release after the amendment. 11 F.3d at 875.[4] Pet. App. 14a-15a. In both cases, the date of the original criminal offense governed the retrospectivity analysis even though, in *Paskow*, the defendant had committed an intervening act of misconduct that subjected him to the new law. Pet. App. 13a-15a (citing *Paskow*, 11 F.3d at 877; *Weaver*, 450 U.S. at 31). The court of appeals reasoned that under *Weaver* and *Paskow*, a prisoner's eligibility for an earlier release is part of his underlying criminal sentence, regardless of the precise mechanism (custody credits, parole) by which that release is brought about; a change in that early-release mechanism thus effectively "changes the legal consequences" of the underlying criminal conduct. Pet. App. 17a (quoting *Weaver*, 450 U.S. at 31). Because Hinojosa committed his offenses of conviction before the change in law, the court of appeals held that amended Section 2933.6 was retrospective as applied to him. Pet. App. 18a.

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[4] As the court of appeals noted, *Paskow*, in turn, relied on this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644, 644-45 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968) (per curiam). Pet. App. 14a-15a & n.6. In *Greenfield*, a three-judge district court held that a Massachusetts law providing for forfeiture of good-conduct credits for a violation of parole violated the Ex Post Facto Clause as applied to an inmate who committed his offense before the change in law but violated his parole after the statute went into effect. 277 F. Supp. at 644-46.

The court of appeals further concluded that the amendment to Section 2933.6 disadvantaged Hinojosa by extending his release date by a year. Pet. App. 20a-22a. It rejected the State's argument that, under *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), Hinojosa's risk of an increased sentence was too speculative and attenuated to violate the Ex Post Facto Clause. Pet. App. 21a-22a. The court of appeals pointed out that unlike in *Morales*, which involved a change only to the timing of parole hearings, here the "substantive formula" for awarding custody credits has been changed, to Hinojosa's detriment. Pet. App. 22a. It also addressed the State's argument that Hinojosa was not disadvantaged because he could disaffiliate from the prison gang and resume earning credits. Pet. App. 22a. The court of appeals explained that waiting six years to enter "inactive" status and debriefing were both lengthy procedures, uncertain to result in full restoration of credits, and debriefing was potentially dangerous to boot. Pet. App. 22a. These new conditions placed on Hinojosa's eligibility for custody credits thus disadvantaged him. Pet. App. 23a.

The court of appeals was careful to note that the decision did not prohibit the State from enacting a new statute to punish in-prison misconduct and applying it to inmates whose underlying offense conduct predated the enactment. Pet. App. 23a-24a. Nor did the decision prevent the State from punishing prison misconduct through new administrative disciplinary measures that stop short of extending the sentence, such as segregated housing and loss of privileges, without regard to the date of the inmate's underlying crime. Pet. App. 19a. Under the court of appeals'

decision, only those new laws that retroactively increased prison time would run afoul of ex post facto prohibitions. Pet. App. 19a, 24a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' NARROW AND CORRECT DECISION DOES NOT WARRANT THIS COURT'S REVIEW

A. Petitioner's Request For Error Correction Misconstrues This Court's Precedents And California Law.

Petitioner asks this Court to "correct" the court of appeals' decision to consider the ex post facto claim de novo, rather than under AEDPA's deferential standards. Pet. 11. As his proposed first question presented makes clear, Petitioner would have this Court intervene to settle a narrow disagreement on the operation, *under state law*, of a state trial court's procedural ruling. Pet. i. Petitioner's faint attempts to cast the issue more broadly -- as one of dueling presumptions in *Ylst* and *Richter*, or the general inapplicability of *Ylst* to California habeas decisions -- are foreclosed by this Court's precedents and are therefore unavailing. And contrary to Petitioner's incomplete and misleading description of California law, the state's habeas review procedures actually support, rather than defeat, the court of appeals' application of *Ylst* in this case. Petitioner's request for case-specific error correction lacks merit and should be rejected.

To the extent that Petitioner argues broadly that the court of appeals improperly elevated *Ylst*'s look-through presumption over *Richter*'s presumption of a merits adjudication, that contention is foreclosed. This Court has continued to apply *Ylst* after *Richter*. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015). Here, Hinojosa filed a habeas petition at every level of the California courts, and the

California Superior Court issued a reasoned decision on his ex post facto claim. Pet. App. 44a. Richter, on the other hand, filed only one state habeas petition, in the California Supreme Court; that petition was denied in a one-sentence summary order. *Richter*, 562 U.S. at 96. As two Justices of this Court have recently noted, *Richter* did not supersede *Ylst* in cases where a lower state court issued a reasoned decision: "With no reasoned opinion to look through to, the Court [in *Richter*] had no occasion to cast doubt on *Ylst*. To the contrary, the Court cited *Ylst* approvingly in *Richter*, . . . and did so again two years later in *Johnson v. Williams*[.]" *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in denial of certiorari) (citations omitted). "In short, *Richter* instructs that federal habeas courts should continue to 'look through' even nondiscretionary adjudications to determine whether a claim was procedurally defaulted." *Id.* That is precisely what the court of appeals did here.

In the same vein, Petitioner erroneously asserts that the California Supreme Court's decision in *In re Reno*, 55 Cal. 4th 428 (2012), establishes that all of that court's summary denials must be treated as merits decisions for purposes of federal habeas review. Petitioner claims that *Reno* addressed "this specific context," Pet. 14, but it did no such thing. In *Reno*, as in *Richter*, the petitioner had previously filed a state habeas petition only in the California Supreme Court, and not first in any lower court. 55 Cal. 4th at 447. The California Supreme Court denied that first habeas petition summarily. *Id.* In *Reno*, the California Supreme Court

explained that its previous summary denial was on the merits.[5] *Id.* But, as in *Richter*, there were no reasoned opinions by lower courts to look through to. *Reno* therefore does not speak to the issue presented in this case.

Moreover, California's original writ system for habeas corpus petitions does not make *Ylst* inapplicable, because *Ylst* itself involved looking through *four* summary denials of California original state habeas petitions to the last reasoned decision on a constitutional claim. 501 U.S. at 805-06. That last reasoned decision had been issued on direct appeal and imposed a procedural bar. *Id.* at 806. In *Ylst*, the Ninth Circuit had ruled that the California Supreme Court's "silent denial" of a state habeas petition constituted a decision on the merits that "lifted the procedural bar" imposed in the last reasoned decision, *id.* at 801 -- essentially the same argument Petitioner advances in this case. Pet. 12-16. This Court reversed and established the following presumption for determining the basis for a state court's denial of a claim: "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst*, 501 U.S. at 803. This Court added, "where, as here, the last reasoned opinion on the claim explicitly imposes a

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[5] Both cases cited in *Reno* for this proposition involved petitioners who filed only in the California Supreme Court and received a summary denial there. 55 Cal. 4th at 447 (citing *In re Clark*, 5 Cal. 4th 750, 760-61 (1993); *Crittenden v. Ayers*, 624 F.3d 943, 949, 960 (9th Cir. 2010)). As distinguished from this case, *Reno*, *Clark*, and *Crittenden* are capital cases, a fact which explains why the habeas petitions were filed directly in the California Supreme Court, and not first in any lower court. *Reno*, 55 Cal. 4th at 446; *Clark*, 5 Cal. 4th at 759; *Crittenden*, 624 F.3d at 947. In California, cases in which a death sentence is imposed are automatically appealed to the California Supreme Court. *See People v. Massie*, 19 Cal. 4th 550, 562 (1998); Cal. Penal Code § 1239(b). If the judgment is affirmed on direct appeal, the defendant may further challenge the judgment by filing a habeas petition directly in the California Supreme Court. *Reno*, 55 Cal. 4th at 442.

procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* *Ylst*'s holding directly controls the present case.

Crucially, in formulating this presumption, this Court knew that the "later unexplained orders" in *Ylst* arose from state habeas petitions invoking the "original jurisdiction," and not the appellate jurisdiction, of the California Court of Appeal and the California Supreme Court; it took care to note that fact for each petition. *Id.* at 800. Nevertheless, this Court looked through two summary denials by the California Supreme Court, one summary denial by the California Court of Appeal, and one summary denial by the California Superior Court before settling on the California Court of Appeal's opinion on direct review as the "last *explained* state-court judgment" on the constitutional claim. *Id.* at 805-06. Because that opinion imposed a procedural bar, and the habeas petitioner had not carried his burden of adducing "strong evidence" to overcome the presumption, review of the claim was procedurally defaulted unless the habeas petitioner could show cause and prejudice for the default. *Id.* at 806. Although the roles are reversed here, and it is the State who bears the burden of rebutting the "look through," the *Ylst* presumption works in the same way.[6] The *Ylst* presumption is not alien to the California courts, with their original habeas jurisdiction; to the contrary, this Court created the *Ylst* presumption with California's collateral review structure in mind.

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[6] The roles are reversed because the State did not argue procedural default at any stage of the proceedings, and the court of appeals found any procedural default defense to be waived. Pet. App. 11a.

More generally, this Court has rejected claims that California's "original writ" system is exceptional for purposes of federal habeas review. In *Carey v. Saffold*, 536 U.S. 214 (2002) ("*Saffold*"), this Court acknowledged that California's collateral review system differed from that of other states "in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition." *Id.* at 221. But it denied that this difference was material for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2):

> California's "original writ" system, however, is not as special in practice as its terminology might suggest. As interpreted by the courts, California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first. *In re Ramirez*, 89 Cal.App.4th 1312, 1316, 108 Cal.Rptr.2d 229, 232 (2001) (appellate court "has discretion to refuse to issue the writ . . . on the ground that application has not [first] been made . . . in a lower court");. . . . At the same time, a prisoner who files that same petition in a higher, reviewing court will find that he can obtain the basic appellate review that he seeks, even though it is dubbed an "original" petition. See *In re Resendiz*, 25 Cal.4th 230, 250, 105 Cal.Rptr.2d 341, 19 P.3d 1171, 1184 (2001) (reviewing court grants substantial deference to lower court's factual findings). Thus, typically a prisoner will seek habeas review in a lower court and later seek appellate review in a higher court[.]

Id. at 222. In short, this Court concluded that California's "'original writ' system functions like the 'appeal' systems of . . . other States." *Id.* at 225. This Court's reasoning in *Saffold* defeats Petitioner's argument that *Ylst*'s look-through doctrine does not apply to California's "original writ" system. The California authorities discussed in *Saffold* show that an original habeas petition filed in the California

Court of Appeal or California Supreme Court does not initiate a completely independent proceeding, unencumbered by any consideration of, or deference to, the Superior Court's reasoning or findings.

While it is true that the California Supreme Court's original habeas jurisdiction extends to the entire State, it does not necessarily follow, as Petitioner asserts, that the California Supreme Court could not possibly have based its denial on the Superior Court's conclusion that Hinojosa had filed in the wrong trial court. Contrary to Petitioner's suggestion, Pet. 10, the California Supreme Court's statewide habeas jurisdiction does not distinguish it from the lower courts. All California courts have statewide jurisdiction in habeas cases.[7] *In re Roberts*, 36 Cal. 4th 575, 582 (2005). Under California law, "both trial and appellate courts have jurisdiction over habeas corpus petitions, but a reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a *proper* lower court." *In re Steele*, 32 Cal. 4th 682, 692 (2004) (emphasis added); *see also People v. Superior Court (Jimenez)*, 28 Cal. 4th 798, 806 n.3 (2002) ("We note that the Court of Appeal does not lack *jurisdiction* over the writ proceeding (Cal. Const., art. VI, § 10), although normally it has discretion to deny a petition that was not filed first in a proper lower court"); 6 B. Witkin & N. Epstein, California Criminal Law, Criminal Writs § 24, p. 629 (4th ed. 2012) ("Even though the appellate court has constitutional jurisdiction to grant habeas corpus . . ., it has

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[7] In fact, the Superior Court itself recognized that it had jurisdiction to adjudicate Hinojosa's case on the merits, as well as discretion not to do so. Pet. App. 44a ("'Although any superior court has jurisdiction to entertain and adjudicate a petition for writ of habeas corpus, it does not follow that it should do so in all instances.'").

discretion to refuse to exercise that jurisdiction, and will normally do so, until the petitioner has unsuccessfully applied for the writ in the lower court of the county of detention.") The details of California law demonstrate that it was not only possible that the California Supreme Court's summary denial was based on Hinojosa's presumed failure to file in the wrong trial court; it was probable, in keeping with the California appellate courts' normal exercise of their discretion in habeas cases.

At bottom, Petitioner's quarrel with the court of appeals' opinion amounts to a case-specific disagreement regarding the details of California habeas procedure. Pet. 10 ("In the circumstances of this case, . . . reliance on *Ylst* makes no sense at all."); Pet. 15 ("There was no basis in this case for the court to rely on a look-through under *Ylst* . . . ."). But, despite his claim that his position is supported by "straightforward California procedural and substantive law," Petitioner musters no authority whatsoever for his claim that the California Supreme Court could not have denied Hinojosa's ex post facto challenge on procedural grounds. Pet. 14-15. Petitioner's meritless plea for error correction is unworthy of this Court's review.

B. Petitioner Did Not Press His *Ylst* Argument In The Court Of Appeals.

This case also presents a poor vehicle for certiorari because Petitioner's claim of error is belated, as well as meritless and limited to the specific facts of this case. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"). In his opening brief in the

court of appeals, Hinojosa argued that the California courts' denial of his habeas petition should be reviewed de novo, because the last reasoned state court decision, that of the Superior Court, either misconstrued his ex post facto claim or erroneously denied the claim on the procedural ground of improper venue, not on the merits. Resp. App. 2a-8a. In the answering brief, Petitioner contended that the Superior Court denied the ex post facto claim on the merits, in the course of analyzing a different claim involving an alleged violation of Hinojosa's plea agreement. Resp. App. 13a. That is, Petitioner agreed that the Superior Court's decision was the operative decision for purposes of federal habeas review, but took issue with Hinojosa's characterization of the Superior Court's decision as a procedural ruling, as opposed to a denial on the merits of the ex post facto claim. Resp. App. 12a-14a. Petitioner affirmatively asked the court of appeals to look through to the Superior Court's decision; now he claims that the decision to look through "makes no legal or logical sense." Pet. 10.

At oral argument, when asked directly about the last reasoned state court decision, Petitioner took a new tack.[8] Reversing course, Petitioner conceded that the Superior Court's decision rested on a procedural ground (9:26-9:36) and asked the court of appeals not to look through to the Superior Court's decision. For the first time, Petitioner argued that in light of California's original writ system for habeas petitions and this Court's decisions in *Richter* and *Cullen v. Pinholster*, 563

[8] All time-stamp references in this paragraph are to the video recording of oral argument in the court of appeals. *See* https://www.youtube.com/watch?v=nEZL67YLZJU.

U.S. 170 (2011), the California Supreme Court's summary denial of Hinojosa's habeas petition must be presumed a denial on the merits. (9:10-10:48.)

Petitioner faults the court of appeals for overlooking principles of state law that bear on the question of whether AEDPA deference applies in this case. Pet. 9-16. In essence, Petitioner argues that these state-law principles represent "*strong* evidence" that *Ylst*'s "look through" presumption, as applied in this specific case, is wrong. *Ylst*, 501 U.S. at 805 (emphasis in original). But, until oral argument, Petitioner himself failed to notice those aspects of California law that he now claims are "straightforward" and obvious. Pet. 14. It goes without saying that an argument not raised in the district court or in appellate briefing, and first touched on at oral argument, hardly constitutes "strong evidence" of anything. Because Petitioner did not press his *Ylst* argument until oral argument (and only glancingly then), and the evidence is insufficient to carry Petitioner's heavy burden of rebuttal in any event, this Court should deny the petition for certiorari.

C. This Case Is A Poor Vehicle For Resolving The *Ylst* Issue Because It Is Not Outcome-Determinative.

Even if the court of appeals committed a case-specific error in applying *Ylst* to the facts of this case, this case does not merit this Court's attention because reversal on that basis would not affect the outcome.

In the court of appeal, Hinojosa argued that AEDPA did not apply for a second, independent reason: the California Superior Court misconstrued his ex post facto claim as challenging the lawfulness of his underlying validation as a prison gang associate, as distinguished from amended Section 2933.6's ex post facto effect

on his sentence regardless of whether the earlier gang validation was proper. Resp. App. 5a-6a. Petitioner evidently shared this understanding of the Superior Court's decision, which it described in its appellate brief as follows: "The court also ruled that as to the *claim of error in validating him as a gang member*, Hinojosa did not avail himself of the relief he could have by filing a habeas petition in the county where he was being held." Resp. App. 10a-11a, emphasis added. The Superior Court's mistaken understanding of the claim explains why it erroneously treated Hinojosa's challenge to his sentence as "essentially a challenge to a condition of confinement." Pet. App. 44a.

When a state court rejects a federal constitutional claim fairly presented to it out of "sheer inadvertence," the resulting decision is not an adjudication on the merits. *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013); *see also Henderson v. Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003) (holding that AEDPA's standards of review do not apply where state courts "misconstrued" petitioner's claim and "did not address . . . actual claim"); *Davis v. Sec'y for Dep't. of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam) (same); *Appel v. Horn*, 250 F.3d 203, 210-12 (3d Cir. 2001) (reviewing de novo where state court erroneously "recharacterized" claim). Hinojosa made clear that he was not challenging the underlying gang validation in the Superior Court proceeding. (ER 34.) For this entirely separate reason, "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court," and AEDPA's deferential standard of review should not apply. *Johnson*, 133 S. Ct. at 1097.

In addition, the court of appeals' ex post facto holding is correct regardless of the standard of review. The Fifth Circuit's recent decision in *Price v. Warden*, 785 F.3d 1039 (5th Cir. 2015), confirms that the court of appeals properly granted relief to Hinojosa even if AEDPA applies. In *Price*, the Fifth Circuit considered a 1997 amendment to Louisiana's good-time credit statute that required a parole violator to forfeit all good-time credit earned; prior to the amendment, the forfeiture was limited to 180 days. *Id.* at 1040. Price committed his underlying crime before the amendment, but violated parole in 2003, after the amendment. *Id.* Price not only knew he was subject to credit forfeiture if he violated parole; he expressly agreed to that condition. *Id.* at 1043.

Applying AEDPA, the Fifth Circuit held that the forfeiture of Price's good-time credits upon parole revocation violated the Ex Post Facto Clause, and that the state court's judgment was not just erroneous, but contrary to clearly established federal law. *Id.* at 1043. The Fifth Circuit identified this Court's summary affirmance in *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968) (per curiam), as controlling precedent on the question of credit forfeiture resulting from intervening misconduct: "By summarily affirming in *Greenfield*, the [Supreme] Court necessarily held that a good-time forfeiture law enacted after a prisoner's sentencing is retrospective, even if forfeiture is triggered by the parolee's post-enactment conduct." *Id.* at 1042-43. The Fifth Circuit therefore held that the amended Louisiana statute could not constitutionally be applied to an inmate "whose crime occurred before its effective date." *Id.* at 1040.

Price demonstrates that the court of appeals properly granted relief to Hinojosa even if it applied the wrong standard of review. This Court's intervention is not needed to correct a decision that reached the right result.

II. THERE IS NO SERIOUS CONFLICT ON THE EX POST FACTO ISSUE, AND THE ISSUE RECURS INFREQUENTLY.

This Court need not intervene to clarify an ex post facto issue that arises in the federal courts, by Petitioner's count, approximately once a decade. The Second and Fourth Circuit cases relied on by Petitioner are highly factbound, as they turn on the specific statutory schemes for earning credits in other states and the timing and nature of the prison misconduct involved. The California Supreme Court decision relied on by Petitioner, *In re Ramirez*, has been called into question over the past thirty years, and it is unclear whether the California Supreme Court would extend it to these facts. In any event, because of AEDPA and the procedural default doctrine, Hinojosa may be the only inmate to benefit directly from the court of appeals' decision. As such, there is no real-world conflict between the California Supreme Court and the Ninth Circuit on the ex post facto question.

A. Any Split In The Federal Courts Of Appeal Is Shallow, Factbound, And Outdated.

Petitioner identifies only two federal decisions, and none from the last fifteen years, with which the court of appeals' decision supposedly conflicts. Pet. 23-25. Because the decisions in those cases depend in large part on the peculiar features of the state credit-earning schemes at issue and the timing of the prison misconduct, they cannot be divorced from their specific facts. Further, it is telling that Petitioner points to no conflicting case postdating this Court's decision in *Johnson v.*

United States, 529 U.S. 694 (2000), which clarified that penalties for postconviction misconduct must be attributed to a defendant's original offense, and not treated as punishment for the misconduct itself. *Id.* at 699-700.

The Second Circuit's decision in *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000), is distinguishable because it turned on the discretionary nature of the Connecticut good time credit statute. The Second Circuit noted that the Connecticut statute, which provided that inmates "may" earn credit for good conduct, made the award of credits "a discretionary matter." *Id.* at 66. The Second Circuit therefore concluded that a Connecticut prison administrative directive preventing prison gang members from earning statutory good time credit did not disadvantage Abed because no firm entitlement to good time credit existed in the first place. *Id.* The analogous California statute, by contrast, is phrased in mandatory terms: "For every six months of continuous incarceration, a prisoner *shall* be awarded credit reductions from his or her term of confinement of six months. A lesser amount of credit based on this ratio *shall* be awarded for any lesser period of incarceration." Cal. Penal Code § 2933(b) (emphases added). Unlike in *Abed*, here there is no question that amended Section 2933.6 tangibly disadvantaged Hinojosa by extending his minimum release date.

Briefly, the Second Circuit also reasoned that the administrative directive was not retrospective as applied to Abed, who was classified as a prison gang member after the administrative directive went into effect. *Abed*, 209 F.3d at 66. Hinojosa, however, was validated as a prison gang associate before Section 2933.6

was amended, and all of the evidence of gang association predated the change in the law. Although the Ninth Circuit did not rely on this fact in finding amended Section 2933.6 retrospective, it clearly distinguishes this case from *Abed*.

Nor is there any conflict with the Fourth Circuit's decision in *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), which dealt with a statute that was not penal in nature. In 1990, the state of Virginia enacted a statute establishing a DNA bank and requiring incarcerated felons to provide a blood sample for the bank prior to release. *Jones v. Murray*, 962 F.2d 302, 308-09 (4th Cir. 1992). The Fourth Circuit held in *Jones* that the DNA requirement, standing alone, was "not penal" and therefore could not violate the Ex Post Facto Clause. *Id.* at 309. It then concluded that violators of the DNA requirement could be "administratively punished" for failing to comply. *Id.* Relying on its en banc decision in *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991) (en banc), the Fourth Circuit characterized the DNA requirement as a "reasonable prison regulation[]" and deemed any subsequent punishment resulting from noncompliance as "part of the sentence of every prisoner," not unlike changes in location, variations of routine, changes in condition of confinement, and denials of privileges. *Jones*, 962 F.2d at 309-10.

While *Jones* was being litigated, the Virginia Department of Corrections adopted regulations that "punished" an inmate's refusal to provide a blood sample. *Ewell v. Murray*, 11 F.3d 482, 484 (4th Cir. 1993). One of the new regulations imposed a penalty of the loss of 90 days of good conduct time for a first refusal, 180 days for a second refusal, and all accumulated good conduct time for subsequent

refusals. *Id.* at 484-85. Two facts were critical to the Fourth Circuit's determination that application of the new regulation to all later refusals did not violate the Ex Post Facto Clause. First, the Fourth Circuit emphasized that the DNA bank statute is "not penal in nature." *Id.* at 485; *see also id.* at 487. It also underscored the fact that Virginia's "good conduct allowance system itself," established by statute, "was not amended during the applicable periods here. The rate of good conduct time allowed and the structure of the system have remained constant." *Id.* at 486. In the Fourth Circuit's view, the unchanged *statutory* credit scheme distinguished *Ewell* from this Court's decision in *Weaver*. *Id.* at 487. Given these specific aspects of Virginia's statutory and regulatory framework, the Fourth Circuit viewed itself as deciding a "narrow question." *Id.* at 486.

Ewell's factual underpinnings distinguish it from this case. As Petitioner points out, the amendment to Section 2933.6 was enacted as part of a "broad criminal justice reform measure." Pet. 5. Petitioner does not dispute that amended Section 2933.6, which can be found in that chapter of the California Penal Code pertaining to "Execution of Sentences of Imprisonment," is "penal" in nature. *See* Cal. Penal Code, pt. 3, tit. 1, ch. 7. And there is no question that, unlike in *Ewell* (and *Abed*), the amendment to Section 2933.6 changed California's statutory custody credits system itself, not merely regulations administering the statutory scheme. Section 2933.6 is located in that article of the Penal Code titled "Credit on Term of Imprisonment," which sets forth the rate and structure of the various credits available to California inmates. Cal. Penal Code §§2930-2935.

Further, *Ewell* rests on the outdated premise that the punishment for refusing to provide a blood sample "does not add punishment for the original crime for which the inmate was incarcerated," as it punishes only *subsequent* misconduct. 11 F.3d at 486. This Court rejected this line of reasoning in *Johnson*, where it held that penalties imposed for a violation of federal supervised release are "part of the penalty for the initial offense," as opposed to "punishment for the violation of the conditions of supervised release." 529 U.S. at 700. Adopting this understanding of supervised release allowed this Court to avoid the "serious constitutional questions" that would arise if postrevocation penalties were construed as punishment for the violation conduct, including the fact that "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* In light of the Fourth Circuit's reliance on this discredited distinction, it is unsurprising that *Ewell*'s ex post facto holding has not been cited in a reported appellate case in more than twenty years.

Although *Johnson* involved federal supervised release, and not loss of custody credits, the same principle applies here. Like the hypothetical violation conduct in *Johnson*, the actual conduct resulting in Hinojosa's loss of custody credits -- mere possession of an envelope, address book, birthday card, and tattoos evincing gang association -- is not criminal in itself. *See People v. Castenada*, 23 Cal. 4th 743, 745 (2000) (conviction under Cal. Penal Code § 186.22, criminal street gang activity, requires "involvement with a criminal street gang that is more than nominal or passive"). And the fact of gang validation underlying Hinojosa's ineligibility for

credits was found by a prison committee, not by a jury beyond a reasonable doubt. Characterizing Hinojosa's additional year of imprisonment as punishment for intervening misconduct, when that misconduct amounts to a status offense, creates more constitutional problems for Petitioner than it solves.

B. There Is No Real-World Conflict With The California Supreme Court.

The California Supreme Court's decision in *In re Ramirez*, 39 Cal. 3d 931 (1985), which predates *Johnson*, suffers from the same misunderstanding of the relevant date for purposes of retrospectivity analysis as *Ewell*. *Ramirez* involved 1982 amendments to California's statutory scheme for sentence reduction credits, which generally expanded the number of acts resulting in credit forfeiture, increased the number of credits subject to forfeiture for misconduct, provided for loss of participation credits as well as good behavior credits, and eliminated limits on credits subject to forfeiture. *Id.* at 933. Although it concluded that the amendments were disadvantageous for ex post facto purposes, the California Supreme Court flatly rejected the habeas petitioner's argument that the amendments were retrospective because they related to the original offense of conviction, not to the post-amendment prison misconduct:

> It is true that the 1982 amendments apply to petitioner only because he is a prisoner and that he is a prisoner only because of an act committed before the 1982 amendments. Nonetheless, the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective. In other words, the 1982 amendments apply only to events occurring *after* their enactment. . . . Accordingly, the 1982 amendments . . . do not relate to petitioner's original crime and are not retrospective under *Weaver*.

Id. at 936-37. Again, this is the same logic rejected by this Court in *Johnson*, which avoided thorny constitutional questions by attributing post-revocation penalties to the original offense of conviction, rather than treating them as punishment for subsequent misconduct. 529 U.S. at 700.

Indeed, the California Supreme Court and California Court of Appeal have recognized *Johnson*'s effect on *Ramirez*'s ex post facto analysis. In *People v. Callejas*, 85 Cal. App. 4th 667 (Cal. Ct. App. 2000), a parolee challenged a parole revocation fine imposed pursuant to a statute enacted after the parolee committed the underlying offense. *Id.* at 669. The California Court of Appeal initially filed an opinion concluding that there was no ex post facto violation. *Id.* at 675-76. The California Supreme Court granted a petition for review, vacated the Court of Appeal's opinion, and ordered reconsideration in light of this Court's decision in *Johnson*. *People v. Callejas*, 2 P.3d 1064 (Cal. 2000). Concluding that there was "no principled way of distinguishing *Johnson* from the present case," the California Court of Appeal departed from *Ramirez* and issued an amended opinion holding that application of the parole revocation fine to a defendant whose underlying crime preceded the enactment of the fine statute would violate ex post facto principles. *Callejas*, 85 Cal. App. 4th at 674-78.

The California Court of Appeal also limited *Ramirez*'s reach in *In re Lomax*, 66 Cal. App. 4th 639 (Cal. Ct. App. 1998). In 1995, California Penal Code § 2933 was amended to grant discretion to the Director of Corrections to decline to restore credits forfeited as a result of certain serious disciplinary infractions. *Lomax*, 66

Cal. App. 4th at 643. Before the 1995 amendment, Section 2933 had required restoration of forfeited credits in most cases, provided the inmate completed a certain period free of discipline. *Id.* In 1996, in response to the statutory grant of discretion, the Department of Corrections revised its regulations to prohibit, for the first time, the restoration of conduct credits forfeited for certain categories of disciplinary infractions. *Id.* at 641, 643. In *Lomax*, the California Court of Appeal departed from *Ramirez* and held that the revised credit-forfeiture regulations violated the Ex Post Facto Clause for prisoners who committed their misconduct prior to the amendments. *Id.* at 643-48; *see also In re Mikhail*, 70 Cal. App. 4th 333, 336 (Cal. Ct. App. 1999) (same). The California Court of Appeal rejected the State's suggestion that *Ramirez* stood for the sweeping proposition that "changes in sanctions for misconduct do not relate to the petitioner's original crime and thus are not retrospective under *Weaver v. Graham*[.]" *In re Lomax*, 66 Cal. App. 4th at 644. Specifically, the *Lomax* court concluded that *Ramirez*'s broad pronouncements must be interpreted in light of this Court's intervening decision in *Lynce v. Mathis*, 519 U.S. 433 (1997). *In re Lomax*, 66 Cal. App. 4th at 644.

In *Lomax*, the California Court of Appeal relied on *Lynce*'s emphasis on the "objective effect" of an amendment, rather than the legislative purpose behind the change. *Id.* at 646-48. Under an analysis focusing on the objective consequences of the change in law, the California Court of Appeal reasoned, "[t]he fact that prison misconduct is at issue does not serve to distinguish this case from [*Weaver v.*] *Graham or Lynce* for purposes of ex post facto analysis." *Id.* at 647. The *Lomax*

Court also regarded *Lynce* as foreclosing the State's argument that custody credits were unrelated to the penalty for the original crime. *Id.* at 646-47. Because it is unclear whether the California Supreme Court would extend its thirty-year-old decision in *Ramirez* to amended Section 2933.6, especially in light of this Court's intervening decisions in *Johnson* and *Lynce*, *Ramirez* does not squarely conflict with the court of appeals' decision in this case.

The active nature of the misconduct at issue in *Ramirez* also differs dramatically from the status offense of gang association. In *Ramirez*, the inmate lost custody credits for the discrete act of altering the paperwork relating to a television set. 39 Cal. 3d at 934. Against this factual backdrop, the California Supreme Court reasoned that "[i]f any aspect of prison life is unconnected to a prisoner's original crime, it would seem to be the sanctions for his misconduct while in prison." 39 Cal. 3d at 936. But that is not so when the misconduct takes the form of gang association: Hinojosa was convicted of participation in criminal street gang activity, in violation of California Penal Code § 186.22(a), a crime that is in fact closely connected to a subsequent finding of gang association. Further, the California Supreme Court stressed that Ramirez had received "fair warning" of the increased sanctions and, nevertheless, chose to alter his sentence "by his own action." *Id.* at 938, 937. Hinojosa, in contrast, was validated as a gang associate before the change in law, and was not on notice that validation would lengthen his sentence. And Hinojosa took no "action" after the change in law. Rather, purely by operation of state law, his status as an associate was considered a continuing

offense for six years. Cal. Code Regs. tit. 15, § 3341.5(c)(6) (2010). *Ramirez* did not contemplate prison misconduct that approaches a status offense.

As a practical matter, the operation of AEDPA blunts any conflict between *Ramirez* and the court of appeals' decision in this case. The Ninth Circuit has held that under AEDPA, the California courts' denial of an ex post facto claim based on the 2010 amendment to Section 2933.6 is not contrary to, or an unreasonable application of, clearly established federal law. *Nevarez*, 749 F.3d at 1128-29. Petitioner fails to mention that the vast majority of Section 2254 petitions filed by California prisoners regarding amended Section 2933.6 will be subject to Section 2254(d), unless the California courts adjudicating those claims decide the case on procedural grounds, *and* Petitioner is unwilling or unable to show that the procedural default bars federal review, as occurred here. For those habeas petitioners filing under AEDPA in the Ninth Circuit, *Nevarez* is controlling. *See, e.g.*, *Porras v. Biter*, 585 Fed. Appx. 675 (9th Cir. 2014) (denying ex post facto challenge to amended Section 2933.6 based on *Nevarez*); *Leal v. Ducart*, 584 Fed. Appx. 861 (9th Cir. 2014) (same); *Garcia v. Barnes*, 584 Fed. Appx. 562 (9th Cir. 2014) (same).

In short, this is not a case in which a state actor is subject to grave uncertainty as to which constitutional rule will govern its conduct on a day-to-day basis. *Cf. United States v. Knights*, 534 U.S. 112, 116 (2001) (noting conflict between California Supreme Court and Ninth Circuit on constitutionality of investigative searches pursuant to common California probation condition). There

is no reason for this Court to grant certiorari to review an idiosyncratic and isolated case in which the state courts decided a case on procedural grounds, no procedural default defense was raised in federal court, and a single habeas petitioner received relief as a result.

III. PETITIONER OVERSTATES THE DECISION'S IMPACT ON PRISON ADMINISTRATION.

First, the court of appeals' decision does not place California prison authorities in an untenable situation with respect to the issuance of custody credits. Pet. 27. This Court has made clear that, when it comes to AEDPA, "disagreeing with the lower federal courts is not the same as ignoring federal law." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). And while Petitioner suggests that the court of appeals' decision "could control the result in future federal civil litigation," Pet. 27, this Court's Section 1983 doctrine proves otherwise. This Court has held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus[,]" not an action under 42 U.S.C. § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Further, a California inmate will not be able to recover monetary damages in federal court for an alleged ex post facto violation because a judgment in his favor "would necessarily imply the invalidity of his . . . sentence," and therefore is not cognizable under Section 1983 "unless the plaintiff can demonstrate that the . . . sentence has already been invalidated." *Heck*

v. Humphrey, 512 U.S. 477, 487 (1994). Because of AEDPA and *Nevarez*, the typical inmate plaintiff will not be able to make this showing of prior invalidation.

Second, the court of appeals' decision does not hinder States' ability to deter serious in-prison misconduct. Noting that Section 2933.6 was not enacted until 1992, Petitioner raises the specter of being unable to impose credit limitations on inmates who committed their underlying crimes prior to 1992 and then engage in an enumerated act of prison misconduct, such as murder, assault, battery, rape, and hostage-taking. Pet. 28. But of course, all of these acts are criminally punishable, and no ex post facto principles prevent the state from initiating a new criminal prosecution to punish and deter such conduct. The maximum SHU term for murder of a non-inmate is 60 months, with an "expected" term of 48 months. Cal. Code Regs. tit. 15, § 3341.9(e)(1)(A). The prospect of losing credit-earning status for four or five years pales in comparison to the criminal penalties for murder -- ranging from death if special circumstances exist to 15 years to life for second-degree murder, Cal. Penal Code § 190(a) -- and it is absurd to suggest that the court of appeals' decision will permit prison misconduct of this magnitude to go unpunished.

Nor does the court of appeals' decision prevent the State from effectively responding to new categories of prison misconduct, such as cell phone usage. California law has long criminalized possession of contraband, such as weapons and drugs, by prison inmates. *See* Cal. Penal Code § 4502 (felony possession of deadly weapon in penal institution); § 4573.8 (felony possession of drugs or paraphernalia in prison or jail). California law also prescribes criminal penalties for specified acts

of assault, battery, hostage-taking, and criminal damage committed inside prison walls, in addition to laws of general applicability that may cover such conduct. *See* Cal. Penal Code § 4500 (assault by life prisoner with deadly weapon); § 4501 (assault with deadly weapon by prisoner not serving life); § 4501.1 (battery upon state prison officer or employee); § 4503 (holding hostage within prison), § 4600 (destroying prison property). Since 2008, possession of an unauthorized cell phone in a California *jail* has been punishable as a misdemeanor. Cal. Penal Code § 4575(a). The court of appeals' decision does not hinder the State's ability to prosecute an inmate under any of these statutes, without regard to the date on which the inmate committed his underlying crime.

The State complains that the court of appeals' decision will diminish the effectiveness of Section 4576, the 2011 law pertaining to cell phones in *prison*. Pet. 29-30. But Section 4576, uniquely among all California "offenses by prisoners," Cal. Penal Code §§ 4500-4576, establishes a two-tier system of punishment: while possession of a cell phone with intent to deliver the phone to an inmate is a misdemeanor punishable by up to six months in jail, Cal. Penal Code § 4576(a), possession of a cell phone by an inmate simply subjects the inmate to losing up to 90 days of conduct credits, *id.* § 4576(c). Section 4576(a) thus initiates a new criminal misdemeanor prosecution, free of ex post facto problems as long as the cell phone possession occurred after the statute's effective date. The State may well prefer Section 4576(c)'s credit forfeiture provision as an expedient way to punish and deter cell phone possession by inmates, without the procedural protections of a jury trial

and proof beyond a reasonable doubt. But there's a constitutional catch to such expedience· the Ex Post Facto Clause prohibits application of the increased credit-forfeiture provision to inmates who committed their offenses of conviction before the statute was enacted.

Third, Petitioner argues that it is unworkable to run a prison in which some inmates earn or forfeit different amounts of custody credit for the same misconduct. Pet. 28-29. But California already operates a correctional system along these lines. As a result of *Lomax* and *Mikhail*, discussed above, *see supra* at pp. 29-31, some inmates could eventually have their forfeited conduct credits restored while others, who committed the same misconduct, would not be eligible for restoration. Contrary to the California Supreme Court's warning in *Ramirez* that such a system was "simply infeasible" and detrimental to prison order, 39 Cal. 3d at 937, the sky did not fall.

Finally, the statutory and regulatory framework that led to Hinojosa's loss of custody credits is in flux. On June 3, 2015, the California State Senate passed S.B. 759, a bill that would repeal Section 2933.6's provision regarding credit-earning ineligibility and replace it with a requirement that the California Department of Corrections and Rehabilitation ("CDCR") establish regulations allowing specified SHU inmates to resume earning credits.[9] S.B. 759, 2015-2016 Reg. Sess. (Cal. 2015). Respondent also asks this Court to take judicial notice of the settlement in

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[9] The bill is currently pending in the California State Assembly. *See* https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB759 (last visited Feb. 26, 2016).

Ashker v. Governor of the State of California, No. 4:09-cv-05796-CW (N.D. Cal.), a federal civil-rights class action suit brought by SHU inmates regarding CDCR's gang management policies and practices, including its use of segregated housing. In the Settlement Agreement, which received final approval from the district court on January 26, 2016, CDCR agreed that it "shall not place inmates into a SHU . . . solely on the basis of their [gang] validation status." *Ashker*, No. 4:09-cv-05796-CW, Dkt. Nos. 486-3 at 4 ¶ 13 (settlement agreement), 488 (order granting final approval of class action settlement agreement) (N.D. Cal. 2016). CDCR also agreed to review the cases of all validated inmates serving indeterminate SHU terms assessed under prior regulations, and to release from the SHU those inmates who have not committed a qualifying rule violation with a proven prison gang nexus within the past two years. *Id.*, Dkt. No. 486-3 at 8 ¶ 25 (settlement agreement). This Court should decline Petitioner's request to review the constitutionality of a sentence determined by a regulatory scheme that Petitioner, as Secretary of CDCR, is in the process of revamping.

Under amended Section 2933.6, it is SHU placement, and not gang validation in itself, that triggers statutory ineligibility for custody credits. Even if Section 2933.6 remains on the books, the *Ashker* settlement means that, going forward, inmates like Hinojosa will not be precluded from earning custody credits based on gang validation alone, and amended Section 2933.6 will have no ex post facto effect. There is no need for this Court to intervene in a situation that is being addressed by California's legislative and administrative bodies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: February 29, 2016

By: Gia Kim
GIA KIM*
Deputy Federal Public Defender
Attorneys for Respondent
**Counsel of Record*

Appendix

NO. 13-56012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO A. HINOJOSA, Petitioner-Appellant, v. CONNIE GIPSON, Respondent-Appellee.	DC NO. CR 12-965-GAF-MRW

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE GARY A. FEESS
United States District Judge

SEAN K. KENNEDY
Federal Public Defender
GIA KIM
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4408
Facsimile: (213) 894-0081
Email: gia_kim@fd.org

Attorneys for Petitioner-Appellant

V. ARGUMENT

Standard of Review

A. Because the California Courts Did Not Decide The Ex Post Facto Claim on the Merits, This Court Should Review This Claim *De Novo*, Without the Deference that AEDPA Requires.

This Court reviews *de novo* a district court's denial of a petition for writ of habeas corpus. *Ali v. Hickman*, 584 F.3d 1174, 1181 (9th Cir. 2009).

For purposes of federal habeas review, this Court "looks[]through the [state courts'] summary dispositions to the last reasoned decision." *McNeal v. Adams*, 623 F.3d 1283, 1287 (9th Cir. 2010). Although Mr. Hinojosa presented his ex post facto claim at every level of state habeas review, the California Court of Appeal and California Supreme Court denied his habeas petitions without comment. (ER 4, 6, 100, 182.) Therefore, the last reasoned decision in this case is the California Superior Court's decision on Mr. Hinojosa's state habeas petition. *See id.*

Contrary to the magistrate judge's conclusion, adopted by the district court, the deferential standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") do not apply to Mr. Hinojosa's ex post facto claim. Under AEDPA, a petitioner must demonstrate that the state court's decision "(1) . . . was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But this deferential standard of

review applies only when the claim "was adjudicated on the merits in State court proceedings." *Id.* When the state courts did not reach the merits of a particular claim, "federal habeas review is not subject to the deferential standard [of Section 2254(d)]. Instead, the claim is reviewed *de novo*." *Cone v. Bell*, 556 U.S. 449, 472 (2009).

Mr. Hinojosa presented the ex post facto claim in Ground One of his Superior Court habeas petition. (ER 18.) Acting pro se, he summarized Ground One as follows: "The California Legislation Senate Bill-18, enactment of 1/25/10 to forfeited petitioner's credit earning violated petitioner plea agreement with this court and the ex post facto constitution." (ER 18.) In the body of the petition, he cited both Ex Post Facto Clauses in Article I of the United States Constitution, as well as *Weaver v. Graham*, 450 U.S. 24 (1981), and *Lynce v. Mathis*, 519 U.S. 433 (1997), leading cases on the ex post facto prohibition as applied to custody credits, and he discussed how those authorities made it unconstitutional to apply amended Section 2933.6 to his pre-enactment conduct. (ER 22, 25, 39-46.) Mr. Hinojosa also made clear that he was not challenging the underlying prison gang validation in this proceeding, as the validation was the subject of a separate state habeas petition. (ER 21, 34.) In Ground Two, Mr. Hinojosa raised due process arguments alleging that the application of amended Section 2933.6 violated his plea agreement. (ER 29, 36, 49-51.)

The Superior Court, in the California courts' last reasoned decision, never adjudicated the merits of Mr. Hinojosa's ex post facto claim. It understood Mr. Hinojosa's petition as presenting two claims. The Superior Court considered "petitioner's first claim of error," generally corresponding to Ground Two of the petition, as arguing that amended Section 2933.6 "violates the terms of petitioner's plea agreement and constitutional right to due process." (ER 1.) It denied this claim on the merits in a reasoned decision. (ER 2.) The Superior Court characterized "petitioner's second claim of error" as follows:

> **The California Department of Corrections and Rehabilitation has unlawfully validated petitioner as a prison gang associate resulting in the retroactive application of recently amended Penal Code § 2933.6 to restrict and/or deny petitioner's eligibility for prison conduct credit in violation of petitioner's constitutional right to due process and the constitutional proscription against ex post facto legislation.**

(ER 2.) It then denied this claim "on grounds petitioner has not sought review of his claim of error in the proper judicial venue." (ER 2-3.) Citing the California Supreme Court's decision in *Griggs v. Superior Court*, 16 Cal. 3d 341, 347 (1976), the Superior Court reasoned that Mr. Hinojosa's claim of improper gang validation resulting in the denial of conduct credits "is essentially a challenge to a condition of confinement that should be properly brought in the superior court of confinement" -- that is, Kings County instead of Orange County. (ER 3.)

In light of the Superior Court's bifurcated decision, which emphasized that its denial of each claim rested on "separate and independent grounds" and addressed only the plea agreement/due process claim on the merits (ER 2), the usual presumption of a merits adjudication under Section 2254(d) is either inapplicable or rebutted. In *Harrington v. Richter*, 131 S. Ct. 770 (2011), the Supreme Court held that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 784-85; *see also Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013) (same). Further, "[t]he presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785. Here, the presumption does not apply because the Superior Court's decision indicates that it either misconstrued Mr. Hinojosa's ex post facto claim or wrongly denied the claim on the state-law procedural ground of improper venue, not on the merits. The district court erred by concluding otherwise. (ER 9-10, 14.)

The most plausible explanation for the Superior Court's decision is that it simply misconstrued the nature of Mr. Hinojosa's ex post facto claim. The Superior Court understood the ex post facto claim as challenging the lawfulness of his underlying validation as a prison gang associate, as distinguished from amended Section 2933.6's retroactive and disadvantageous effect on his sentence

regardless of whether the earlier gang validation was proper. (ER 2-3.) The Superior Court's understanding explains why it erroneously considered Mr. Hinojosa's challenge to his sentence as "essentially a challenge to a condition of confinement." (ER 3.) Yet the gravamen of Mr. Hinojosa's petition clearly targeted the new legislation's retrospective effect on his sentence, as opposed to his conditions of confinement (ER 18, 22, 25, 39-46), and expressly disavowed any challenge to the prison gang validation (ER 34). When a state court misconstrues a federal constitutional claim fairly presented to it, the resulting decision is not deemed to be an adjudication on the merits. *See Henderson v. Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003); *Davis v. Sec'y for Dept. of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam); *Appel v. Horn*, 250 F.3d 203, 210-12 (3d Cir. 2001). AEDPA deference is therefore unwarranted.

Second, even if the Superior Court properly construed Mr. Hinojosa's ex post facto claim, its procedural ruling was erroneous and cannot bar federal habeas review. "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). A state procedural ground is adequate if it is "firmly established and regularly followed." *Beard*, 558 U.S. at 60 (citation and internal quotation marks omitted). Here, the Superior Court viewed the ex post facto claim as "essentially a challenge

to a condition of confinement" that should have been raised in the county of confinement, not in the county of conviction. But this rule was not firmly established and regularly followed in California. To the contrary, at the time of the Superior Court's decision, a published opinion of the California Court of Appeal held precisely the opposite, that a habeas petition challenging the denial of custody credits "is not related to the conditions of . . . confinement" and was properly brought in the district of conviction. *In re Oluwa*, 255 Cal. Rptr. 35, 37 (Cal. Ct. App. 1989). The existence of a published appellate case refuting the Superior Court's conclusion demonstrates that the procedural rule it relied on was inadequate to foreclose federal habeas review. *See Scott v. Schriro*, 567 F.3d 573, 581-82 (9th Cir. 2009).

Finally, the Superior Court's procedural ruling was inadequate for another reason. The Superior Court paraphrased *Griggs*'s holding as follows: "Challenges to conditions of an inmate's confinement should be entertained by the superior court of the county wherein the inmate is confined." (ER 3[citing 16 Cal. 3d at 347].) But what *Griggs* actually holds is that "[i]f the challenge is to conditions of the inmate's confinement, then the petition *should be transferred* to the superior court of the county wherein the inmate is confined if that court is a different court from the court wherein the petition was filed." *Id.* (emphasis added). The Superior Court made no mention of transferring Mr. Hinojosa's petition and instead simply denied it. (ER 2-3.) *Griggs* itself shows that the Superior Court's disposition of

the ex post facto claim -- denial, instead of transfer -- relied on a procedural rule that was not firmly established and regularly followed. A state court's erroneous denial on procedural grounds means there is no state court decision on the merits, and the federal court must review the merits *de novo*. *See Scott v. Ryan*, 686 F.3d 1130, 1133 (9th Cir. 2012).

For any and all of the foregoing reasons, the ex post facto claim is not subject to Section 2254(d)'s deferential standard applicable to state-court adjudications on the merits. This Court's review is therefore *de novo*.

Discussion

B. On *De Novo* Review, This Court Should Grant Habeas Relief Because the Amendment to Section 2933.6 Violates the Ex Post Facto Clause.

The Constitution provides that "No State shall . . . pass any . . . ex post facto Law." U.S. Const., art. I, § 10, cl. 1; *see also id.* at art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). Found twice in the Constitution, the ex post facto prohibition ensures that "legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Put differently, the Ex Post Facto Clause "places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433, 440 (1997).

13-56012

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO HINOJOSA,

Petitioner and Appellant,

v.

CONNIE GIPSON, Warden,

Respondent and Appellee.

On Appeal from the United States District Court
for the Central District of California

No. SACV 12-965 GAF (MRW)
Honorable Gary A. Feess, Judge

RESPONDENT-APPELLEE'S BRIEF

KAMALA D. HARRIS
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
KEVIN VIENNA
Supervising Deputy Attorney General
DAVID DELGADO-RUCCI
Deputy Attorney General
State Bar No. 149090
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2223
Fax: (619) 645-2191
Email: David.DelgadoRucci@doj.ca.gov
Attorneys for Respondent and Appellee

as prison gang members and are housed in a security housing unit (SHU) were ineligible to earn credits pursuant to California Penal Code sections 2933 or 2933.5. As a result, Hinojosa, a validated prison gang associate confined in the SHU, has been ineligible to earn conduct credits since that date.

C. Habeas corpus proceedings in the California courts

Hinojosa did not file a direct appeal. His actions in the California courts were limited to the filing of habeas corpus petitions.

Hinojosa's habeas corpus petition in the Orange County Superior Court, claiming that application of the credit restrictions violated his plea agreement and the right to due process, and that the California Department of Corrections and Rehabilitation (CDCR) incorrectly validated him as a gang member, resulting in the restrictions on his good time credits was rejected. The court ruled that there was no violation of the plea agreement since the plea agreement did not contain an express promise or guarantee that Hinojosa would earn fifteen percent conduct credit regardless of subsequent events that might occur while he was serving his sentence, and that the trial court was not required to inform Hinojosa of the possibility of future changes to the law that might adversely impact him. The court also ruled that as to the claim of error in validating him as a gang member,

Hinojosa did not avail himself of the relief he could have by filing a habeas petition in the county where he was being held. (1 ER 1-3.)

Hinojosa's subsequent habeas corpus petitions in the California Court of Appeal and the California Supreme Court, raising this claim, were denied without comment. (1 ER 4-6.)

Hinojosa filed a federal habeas petition raising his claim. On March 28, 2013, the Magistrate Judge, Honorable Michael R. Wilner, filed a Report and Recommendation recommending the denial of relief. The report stated:

> The Ex Post Facto Clause prohibits the enactment of a law that punishes an act not punishable at the time it was committed, or imposes additional punishment than prescribed when the act was committed. For a law to violate the ex post facto prohibition, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). A change in the law is disadvantageous if it is "more onerous than the law in effect on the date of the offense. Id. at 30-31. A statute that retroactively revokes previously-awarded credits violates the Ex Post Facto Clause, as it has "the effect of lengthening [the prisoner's] period of incarceration." Lynce v. Mathis, 519 U.S. 433, 443, 447 (1997) (statute "did more than simply remove a mechanism that created an opportunity for early release") (emphasis in original).
>
> To date, no federal court has found Section 2933.6 to be unconstitutional. See, e.g., *Corral v. Gonzalez*, No. CV 12-1315 LJO (SKO), 2013 WL 635933 (E.D. Cal. Feb. 20, 2013); Smith v. Holland, No. CV 12-1529 BAM, 2012 WL 5387366 (E.D. Cal. Nov. 1, 2012); Munoz v.

members and housed in a security housing unit (SHU) constitutes a violation of ex post facto principles The statute does not. The decisions of the California courts are entitled to deference.

ARGUMENT

I. THE CALIFORNIA COURTS ADDRESSED THE CLAIM REGARDING A VIOLATION OF EX POST FACTO PRINCIPLES IN REGARDS TO THE AMENDMENT TO CALIFORNIA PENAL CODE §2933.6.

Respondent first addresses the claim made by Hinojosa that the California courts's decisions did not address on the merits the claim of a violation of ex post facto principles and, therefore, this Court should review the matter *de novo*. According to Hinojosa, the trial court had decided two issues: one regarding a violation of the plea agreement, and the other based on due process, but never the ex post facto claim. (AOB 16-22.) Hinojosa also claims that because of this, this Court may address the claim without finding that *Barnes* is binding precedent. (AOB at 24.) is wrong. The claim was addressed by the California courts, and deference under AEDPA is required.

Hinojosa raised two claims in his state habeas corpus petition in the California Supreme Court. In his petition he argued that the new credit provisions constituted a violation of ex post facto principles and due process because it violated his plea agreement. (2 ER 16-27, specifically, 2 ER 22 (title of argument) and 27, section 15.)

The trial court correctly denied that claim. Although it utilized language that referred to the plea agreement and due process (1 ER 1), its analysis as to how the new credit provisions did not violate the plea agreement, by necessity, resolved the ex post facto argument since it involved the denial of future credits while Hinojosa was in prison and under the amended state statute. *See Johnson v. Williams*, __ U.S. __, 133 S. Ct. 1088, 1096 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.")

Any criticism that the California courts failed to use either express language with the term "ex post facto" or even cite to the leading Supreme Court authorities on ex post facto laws lacks merit. State courts are not required to cite, let alone be aware of, existing United States Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Rather, Hinojosa must "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Richter,* 131 S. Ct. at

786-87. He has failed to do so. Here, the result of the denial by the trial court, and the resultant silent denials in the California Court of Appeal and California Supreme Court, are entitled to deference, particularly where the result is not contrary to Supreme Court precedent.

II. *NEVAREZ V. BARNES*, 749 F.3D 1124, IS CONTROLLING PRECEDENT IN THIS CASE. THE CLAIM HERE MUST BE REJECTED.

The Ninth Circuit, in *Barnes*, 749 F.3d 1124, found there was no violation of ex post facto principles due to the amendment of California Penal Code §2933.6. In *Barnes*, the petitioner received a twelve-year prison sentence. Later, while in prison, he was convicted of bringing marijuana into prison, and received an additional three-year sentence. Afterwards, he was validated as an associate of the Mexican Mafia prison gang and was assessed an indeterminate term in the security housing unit. At the time, California law stated that the petitioner was eligible to earn one day of good conduct credit for every two days served. Later, California Penal Code §2933.6 was amended to deny conduct credits for inmates who are housed in a security housing unit and are validated gang affiliates. After the state courts denied relief on the claim of a violation of ex post facto principles, the petitioner went to federal court where he lost as well. The Ninth Circuit held that the fact that amended California Penal Code §2933.6 applied only

No. 15-833

IN THE

Supreme Court of the United States

JEFFREY BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Petitioner,

v.

ANTONIO A. HINOJOSA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF SERVICE

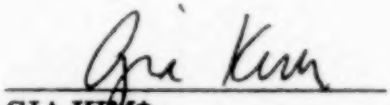
I, Gia Kim, a Deputy Federal Public Defender in the Office of the Federal Public Defender who was appointed as counsel for Respondent under the Criminal Justice Act, 18 U.S.C. § 3006(A)(b), do swear or declare that on February 29, 2016, as required by Supreme Court Rule 29, I served the enclosed Motion for Leave to Proceed in Forma Pauperis and Brief for Respondent in Opposition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents with Federal Express for first overnight delivery.

The names and addresses of those served are as follows:

Phillip J. Lindsay
State of California
Department of Justice
600 West Broadway, Suite 1800
San Diego, CA 92101
(619) 645-3134
Counsel for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 2016.



GIA KIM*
Deputy Federal Public Defender
Attorney for Respondent
**Counsel of Record*

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-0081 FAX

HILARY L. POTASHNER
Federal Public Defender
CHRISTOPHER W. DYBWAD
Chief Deputy

AMY M. KARLIN
Directing Attorney
Santa Ana Office
JEFFREY A. AARON
Directing Attorney
Riverside Office

Direct Dial: (213) 894-4408

February 29, 2016

Office of the Clerk
Supreme Court of the United States
One First Street, North East
Washington, DC 20543

Re: *Jeffrey Beard, Secretary, California Department of Corrections and Rehabilitation, Petitioner v. Antonio A. Hinojosa, Respondent*
Supreme Court No. 15-833

Dear Sir/Madam:

Enclosed please find an original and 10 copies of Respondent's (1) Motion for Leave to Proceed In Forma Pauperis, (2) Brief for Respondent in Opposition, (3) Appendix, and (4) Certificate of Service.

Also enclosed is a copy of the cover page of the Motion for Leave and the Brief for Respondent in Opposition. For proof of filing, kindly stamp these pages and return them to us in the enclosed postage prepaid envelope.

Respectfully submitted,

Gia Kim

GIA KIM
Deputy Federal Public Defender
Counsel of Record

Encl.
GK/mb

No. 15-833

In the Supreme Court of the United States

SCOTT KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner*,

v.

ANTONIO A. HINOJOSA, *Respondent*.

ON PETITION A FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JESSICA N. BLONIEN
Acting Senior Assistant Attorney General
STEVEN T. OETTING
Deputy Solicitor General
PHILLIP J. LINDSAY*
Supervising Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 645-3134
Phillip.Lindsay@doj.ca.gov
**Counsel of Record*

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STATUTES

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§ 1983 9

Hinojosa argues that the Ninth Circuit correctly applied the look-through rule of *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), to bypass AEDPA, and that any error is "case-specific" and unworthy of correction. Opp. 12-18. He also contends the *Ylst* error is not properly presented (Opp. 18-20), and that correcting it would not change the result in his case (Opp. 20-23). On the merits, Hinojosa argues that the decision below creates no "serious," current, or "real-world" conflict (Opp. 23-33), and creates no significant problem for state officials or prison administration (Opp. 33-37). None of this is correct.

1. a. Hinojosa argues (Opp. 12-13) that there is no "broad[]" open question about how to apply the *Ylst* "look-through" presumption together with the "merits" presumption of *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011). But here the State argues only that *Ylst* cannot be applied where (i) a state supreme court has expressly stated that an unexplained judgment is made on the merits and (ii) the only possible "look-through" ground—improper venue in a trial court—*could not* be the ground for the later judgment. *See, e.g.*, Pet. 10-11.

Hinojosa questions (Opp. 13-14) the State's reliance on the California Supreme Court's clear statement in *In re Reno*, 55 Cal. 4th 428, 447 (2012), that its silent denial of a state habeas petition is a ruling on the merits. He argues that in *Reno* "there were no reasoned opinions by lower courts to look through to." Opp. 14. But he does not explain why that circumstance should limit the state court's explanation of how its judgments should be understood. *Cf. Bradshaw v. Ricky*, 546 U.S. 74, 76 (2005) (per curiam) (federal habeas courts are bound by state courts' interpretation of state law).

Hinojosa also argues (Opp. 14-18) that California's "original writ" system "does not make

Ylst inapplicable." Again, the State has not argued that it does. Rather, applying an *Ylst* look-through makes no sense here.

Hinojosa's state petition invoked the state supreme court's original jurisdiction, and the court was required to grant or deny relief. While the court issued no opinion, one thing is certain: Hinojosa's ex post facto claim was *not* procedurally barred in the state supreme court based on improper *venue*. Even leaving aside *Reno*, there is no basis for using an *Ylst* look-through to rebut *Richter's* "strong" merits presumption. *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). That is especially true where, as here, a particular federal claim is one that state supreme court precedent all but foreclosed; that had been specifically rejected by at least two published state appellate opinions; and as to which the state supreme court had already denied discretionary review and rejected another state habeas petition in which there was no procedural bar question. *See* Pet. 22 & n.7

Hinojosa argues (Opp. 17-18) that the supreme court could have dismissed his petition on the ground that he should first present it to the correct trial court. But *Ylst* presumes that a silent denial rests on *the same* ground as an earlier, reasoned decision. Hinojosa would presume denial based on a *different* procedural ground—lack of exhaustion, not lack of venue.

Moreover, Hinojosa's authorities (Opp. 17-18) make clear that a habeas denial based on failure to exhaust a proper lower-court remedy is made "without prejudice." *See, e.g., In re Steele*, 32 Cal. 4th 682, 692 (2004). Here, nothing suggests that the order denying Hinojosa's petition was anything other than a final adjudication. When a California court issues an order *without* prejudice, it makes that

clear. *See e.g., In re Andres*, 25 Cal. 3d 414, 415 (1979) (denying habeas petition without prejudice to seeking relief in trial court); *In re Baker*, 206 Cal. App. 3d 493, 496 n.1 (1988) (contrasting silent and "without prejudice" denials). Indeed, express language is necessary to make clear that a later filing is not precluded as successive. *See In re Clark*, 5 Cal. 4th 750, 774-775 (1993). Thus, it is scarcely conceivable that the order silently denying Hinojosa's habeas petition was intended to be without prejudice.

The AEDPA issue here is "case-specific" (Opp. 12, 18) only in a sense that will apply to any question about the application of *Ylst* or *Richter* to impose or avoid AEDPA. The State seeks not mere "error correction" (*id.*), but to enforce the prohibition on relitigating federal claims already resolved on the merits by state courts. *Compare, e.g., Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam); *Marschall v. Rodgers*, 133 S. Ct. 1446, 1450-1451 (per curiam). This is especially appropriate where, as here, failure to apply AEDPA has led the appellate court to address a constitutional claim unnecessarily, create a conflict with other courts, and interfere with state prison administration. *See* Pet. 11-12, 19-30. An AEDPA error leading to these consequences is not "unworthy of this Court's review" (Opp. 18).

b. Hinojosa argues briefly (Opp. 18-20) that the State failed to press its AEDPA argument below. But the State has consistently argued that its courts' rejection of Hinojosa's ex post facto claim is entitled to AEDPA deference. The petition advances no new claim. *See, e.g., Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Illinois v. Gates*, 462 U.S. 213, 219-220 (1983). The particular argument advanced now, concerning *Richter's* application, was raised at oral argument below; and the court of appeals, after specifically adverting to the oral argument, held that *Ylst*

applied because the state trial court based its ruling on improper venue. Pet. App. 10a. The State's challenge to that holding is properly presented.

c. Finally, Hinojosa argues that the AEDPA question is not "outcome-determinative." Opp. 20-23. But his theory that the state trial court "overlooked" his claim, *see Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013), is refuted by the record, Pet. App. 43a-45a. And his argument (Opp. 22-23) that he would prevail even under AEDPA, citing *Price v. Warden*, 785 F.3d 1039 (5th Cir. 2012), is refuted by the Ninth Circuit's own opinion. *See* Pet. App. 9a ("If AEDPA applies here, we are bound by our decision in *Nevarez* and must ... [deny] Hinojosa's petition.") It is hard to see how a question could "affect the outcome" (Opp. 20) more than that.

2. The Ninth Circuit's AEDPA error led it into conflict with other courts. Far from being "outdated" (Opp. 23), that conflict is brand new—and wholly avoidable.

a. Hinojosa seeks to distinguish *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000). Opp. 24-25. But he ignores its clear holding that a new prison directive prohibiting gang-classified inmates from earning future good-time credits "was not applied retroactively" because "[b]y its terms, [it] concerned ongoing and future—not past—conduct." 209 F.3d at 66. *Abed* "turned" (Opp. 24) on that point just as much as on the regime's discretionary nature.

To violate the Ex Post Facto Clause, a law must be both retrospective *and* disadvantageous. *Lynce v. Matthis*, 519 U.S. 433, 441 (1997). *Abed* held that the new rule was *neither*. 209 F.3d at 65-66. Even if the regime had been non-discretionary, the court would have upheld the change as not retrospective. *Id.* at 66. The Ninth Circuit's holding under similar facts conflicts directly with *Abed*.

Hinojosa argues (Opp. 24-25) that in *Abed* the prisoner was classified as a gang member after the rule change, while Hinojosa was classified before California amended Section 2933.6. As he concedes (Opp. 25), however, the court below made nothing of this difference. Indeed, the court expressly accepted the state courts' conclusion that Hinojosa's misconduct was a continuing offense. Pet. App. 17a n.8. It based its analysis on the premise that "if the relevant date is the date of the in-prison misconduct," then "§ 2933.6 is not retrospective." *Id.* That is the premise on which the case comes to this Court, and why, absent reversal on AEDPA grounds, the ex post facto issue is cleanly presented for review. *See* Pet. 27-30.

b. Hinojosa also fails to distinguish *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), and *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993). He points out (Opp. 25) that *Jones* rested in part on a conclusion that the new DNA statute was not "penal." But the holding relevant here is that officials could treat refusal to comply as in-prison misconduct, and impose a loss of good-conduct credits—regardless of when a prisoner committed his underlying crime. *Id.* at 309-310. The court reasoned that "reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner, and they do not constitute additional punishment [for the underlying crime] and are not classified as *ex post facto*." *Id* at 309.

As to *Ewell*, Hinojosa argues Virginia's "'rate of good conduct time allowed and the structure of the system ... remained constant,'" while the amendment of Section 2933.6 at issue here "changed California's statutory custody credits system itself, not merely regulations administering the statutory scheme." Opp. 26 (in part quoting *Ewell*, 11 F.3d at 486). That

is a distinction without a difference. In this case, as in *Ewell*, if Hinojosa had complied with all prison regulations he would have continued to receive the same credits before and after Section 2933.6's amendment. As he acknowledges (Opp. 27), the crux of *Ewell*'s reasoning was that so long as a new credit-loss provision was triggered only by in-prison misbehavior, any application to new misconduct was prospective. Such changes did not violate the Ex Post Facto Clause because inmates have "no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." 11 F.3d at 486.

Hinojosa argues (Opp. 27) that this Court "rejected this line of reasoning" in *Johnson v. United States*, 529 U.S. 694 (2000). There, the Court observed that treating the consequences of a supervised release violation as "punishment" for that violation would raise constitutional questions. *Id.* at 700. Indeed, treating them as punishment for the original crime was "all but entailed by [the] summary affirmance of *Greenfield v. Scafati*, 277 F. Supp. 644 (D. Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713 (1968), in which a three-judge panel forbade on ex post facto grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment." *Id.* at 701. Ultimately, the Court resolved *Johnson* on statutory grounds. *Id.* at 700-713.

Johnson considered how to analyze condition-of-release violations. *See, e.g.*, 529 U.S. at 699-701. It did not consider the very different context of administrative sanctions imposed for in-prison misconduct. That context makes a case like *Ewell*—or like this one—quite different from cases like *Johnson* or *Greenfield*. Indeed, the Ninth Circuit,

although it ruled against the State in this case, has expressly acknowledged the difference. *Nevarez v. Barnes*, 749 F.3d 1124, 1129 (9th Cir. 2014) (noting that *Greenfield* did not "address the situation where the state has increased punishment for ongoing prison misconduct").

c. Likewise, *Johnson* does not lessen the conflict between the decision below and the decisions of the California courts. *See* Opp. 1, 28-29, 31; Pet. 19-23. On the contrary, as the petition notes (at 21 n.5), in *In re Ramirez*, 39 Cal. 3d 931, 937-938 (1985), the California Supreme Court specifically considered this Court's affirmance in *Greenfield* and expressly distinguished parole violations from in-prison misconduct. There is no reason to think that the state high court would revisit *Ramirez* in light of *Johnson*'s reliance on *Greenfield*, or make any less of a distinction between *Johnson*'s discussion of supervised release and the in-prison misconduct at issue in this case.

The same distinction accounts for *People v. Callejas*, 85 Cal. App. 4th 667 (2000), which involved a parolee's challenge to a parole-violation fine. That makes the case like *Johnson*, but unlike *Ramirez* or this case. And *In re Lomax*, 66 Cal. App. 4th 639 (1998) is inapposite because it held that new credit-related regulations could not be applied to an inmate *who committed misconduct before the change*. *Id.* at 641; *see* Opp. 29-31. *Lomax* did not address the situation here, where an inmate commits misconduct *after* a change. *See* Pet. App. 17a n.8.

In fact, we know that the California courts would continue to reject the precise ex post facto claim at issue here, because they repeatedly did so. *See* Pet. 21-23, citing *In re Efstathiou*, 200 Cal. App. 4th 725 (2011); *In re Sampson*, 197 Cal. App. 4th 1234 (2011); and *Nevarez*, 749 F.3d at 1127-1128.

Hinojosa offers no response to this demonstrated position of the California courts. Indeed, he never even acknowledges *Efstathiou* or *Sampson*. The Ninth Circuit's constitutional holding in this case creates a square conflict with the state courts.

3. Finally, that conflict, and the Ninth Circuit's constitutional holding, are important in the "real world." *See* Opp. 28, 32-33, 33-37. As the petition explains (at 25-30), they put state prison administrators in an untenable position.

Hinojosa suggests (Opp. 32) that the State can largely ignore the decision below, because in federal habeas proceedings *most* ex post facto challenges *should* be subject to review only under AEDPA standards, and thus rejected under existing California decisions and *Nevarez*. That is, he suggests that state officials flout the Ninth Circuit's conclusion that state law violates the federal Constitution on a theory that most prisoners will be unable to litigate their claims de novo in federal court. But state officials should not have to choose whether to follow the view of the state courts or that of the federal circuit court on a question of federal constitutional law.

That is particularly true where the question implicates both the individual constitutional rights of state inmates and the safe and efficient operation of the Nation's third-largest prison system. It is also especially true where any particular inmate's ability to gain relief from the federal courts would likely rest on idiosyncratic, or even capricious, factors.[1] The

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[1] The decision below has already resulted in at least one paradoxical result. *Gomez v. Peery*, No. 3:12-cv-02338-JD (S.D. Cal. orders filed Aug. 25, 2015 and February 27, 2016) (denying ex post facto claim under AEDPA but then granting relief on plea agreement claim based on violation of an ex post facto law,

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State cannot fairly and effectively administer its prisons, and respond to future penological challenges, where the law ultimately applicable to any given inmate depends on unpredictable factors. Nor would such a system promote respect for the law.

Hinojosa also unduly discounts the potential for civil liability for state officials under 42 U.S.C. § 1983. He argues (Opp. 33-34) that the "typical inmate plaintiff" (Opp. 34) would have to present an ex post facto challenge in a habeas proceeding, rather than a civil claim, because success would necessarily result in an earlier release. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). But if the decision below controls in the federal courts while the State instead follows contrary state-court decisions, any inmate who managed to secure habeas relief would no doubt then seek compensatory and punitive damages, as well as attorney's fees, under Section 1983. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (permitting civil suits if conviction or sentence is invalidated).

Moreover, Ninth Circuit law might permit civil recovery by any inmate whose habeas petition is rendered moot by release from prison. *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002). Under that rule, *Heck's* favorable-termination requirement would not be a prerequisite to a civil action. *Id.* And the plaintiff would surely cite the decision below as a basis for relief. Notably, under this perplexing state of the law inmates would have an incentive to delay or forgo raising the ex post facto claim in habeas proceedings and instead file civil rights suits after their release.

Perhaps most seriously, the decision below would interfere substantially with the State's ability

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(...continued)
citing decision below).

to administer its prisons and to deter serious in-prison misconduct. *See* Pet. 28-30. While this case involves gang-related behavior, the logic of the decision below would extend to any change to prison rules affecting the earning of good-time credits. Pet. 28-29. And as the California Supreme Court concluded long ago, it is "simply infeasible to run a prison" in which some inmates are immune from punishment for misconduct, or groups of inmates face different rules for in-prison behavior based on the dates of their underlying crimes. *Ramirez*, 39 Cal. 3d at 937

As Hinojosa notes (Opp. 36-37), California continues to experiment with many forms of criminal justice reform. It should not be hampered in doing so by the creation of unnecessary legal uncertainty or by flawed constitutional holdings that impede the appropriate use of common and sensible tools of prison administration. Hinojosa's suggestion (Opp. 34-36) that prison officials rely entirely on criminal prosecution to address in-prison misconduct is unrealistic. And while the decision below notes (Pet. App. 19a) that other options not involving loss of good-time credits may remain available, restricting the flexible use of "good time" credits will impose a substantial burden on state prison administration.[2]

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[2] Substitution of the other measures suggested by the court below, including the increased use of segregated housing, would hardly be unproblematic. *See Ayala v. Davis*, 135 S. Ct. 2187, 2209-2210 (Kennedy, J. concurring). Moreover, contrary to Hinojosa's suggestion (Opp. 36-37), changes implemented in accordance with the recent settlement in *Ashker v. Governor of the State of California*, No. 4:09-cv-05796-CW (N.D. Cal.), will neither address nor moot the petition. The *Ashker* settlement changes the criteria for segregated housing for gang affiliates and reduces the time most affiliates will be spend in segregation. It does not eliminate gang validations, or the use

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Particularly in a time of reform and innovation, prison officials need clear, uniform, and workable constitutional guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
JESSICA N. BLONIEN
Acting Senior Assistant Attorney General
STEVEN T OETTING
Deputy Solicitor General
PHILLIP J. LINDSAY
Supervising Deputy Attorney General
Counsel of Record

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(...continued)
of segregated housing for validated inmates who commit other misconduct.